FINAL STATEMENT OF REASONS
for
PROPOSALS TO AMEND REGULATIONS WITHIN SUBCHAPTER 3, ARTICLE 6, AND SUBCHAPTER 4 OF CHAPTER 8, TITLE 8, CALIFORNIA CODE OF REGULATIONS, SECTIONS 16404 THROUGH 16439.

UPDATE OF INITIAL STATEMENT OF REASONS

As authorized by Government Code Section 11346.9(d), the Director of the Department of Industrial Relations ("Director") incorporates the Initial Statement of Reasons prepared in this rulemaking.

Revisions Following Initial Public Comment Period

The following sections were revised following the initial public comment period and circulated for further public comment: 16404, 16422 [non-substantive only], appendix B following section 16423, 16424 [non-substantive only], 16425, 16426, 16427 [non-substantive only], 16428 [non-substantive only], 16429 [non-substantive only], 16431, 16432, 16434, 16435 [non-substantive only], 16435.5 [non-substantive only], 16436 [non-substantive only], 16437 [non-substantive only], new Appendix E following 16437, and 16439 [non-substantive only].

Section 16404. Use of Electronic Reporting Forms.

In subsection (e), the word "party" was changed to "contractor or subcontractor" in two locations to make the language more limited and specific. In the same subsection, the words "submit or" were inserted before the word "receive" in response to public comments that were consistent with the Director's intent that contractors not be compelled to submit payroll reports electronically if they lack the resources or capacity to do so.

Section 16422. Applicable Dates for Enforcement of Labor Compliance Programs.

Non-substantive changes were made to the format of citations (to other regulations) in subsections (d) and (g). The purpose of these changes and similar changes in other sections was to make the citations more consistent and understandable.

Appendix B following Section 16423.

Non-substantive changes were made to the format of citations, references to recent statutory amendments were deleted, and an additional statute was added as item 13. [This Appendix subsequently was deleted from the final proposals, as noted below.]

Section 16424. Application for Approval.

Typographical changes only were made in this section.

Section 16425. Approval of Awarding Body's Labor Compliance Program.

A new subsection (f) was added to enable labor compliance programs with initial approval status under existing regulations to convert to unrestricted approved status by meeting specified requirements. Specifically, the program's annual reports would have to be up-to-date and accurate; the program would have to show that it continues to employ experienced and trained personnel and has competent legal support; it would have to update its manual and procedures to comform with changes in the law since the program was first approved, including changes resulting from these regulatory amendments; and it would have to be in compliance with any specific conditions placed on the program's approval by the Director. The purpose of the revision is to make sure that programs are updated to comply with current legal requirements, are filing timely reports, and are still meeting minimum approval standards as a condition for retaining their approved status.

Section 16426. Approval of Third Party Labor Compliance Program.

A typographical change was made in subsection (a)(8). This section was also revised in the same manner as the preceding section 16425. A new subsection (f) was added to enable labor compliance programs with initial approval status under existing regulations to convert to unrestricted approved status by meeting specified requirements. Specifically, the program's annual reports would have to be up-to-date and accurate; the program would have to show that it continues to employ experienced and trained personnel and has competent legal support; it would have to update its manual and procedures to conform with changes in the law since the program was first approved, including changes resulting from these regulatory amendments; and it would have to be in compliance with any specific conditions placed on the program's approval by the Director. The purpose of the revision is to make sure that programs are updated to comply with current legal requirements, are filing timely reports, and are still meeting minimum approval standards as a condition for retaining their approved status.

Section 16427. Extended Authority.

A typographical change only was made in subsection (d).

Section 16428. Revocation of Approval.

Typographical changes were made in subsections (b)(2), (c), and (f), and the format of a citation was revised in subsection (d) to make the formatting more consistent and understandable.

Section 16429. Notice of Labor Compliance Program Approval.

The format of a citation at the end of subsection (a) was revised to make the formatting more consistent and understandable.

Section 16431. Annual Report.

In response to comments, the Director proposed to adopt Option B from the two options that were presented with the initial proposals. The purpose for selecting Option B was to require a consistent reporting format for all programs except for those programs with extended authority under amended section 16427 with whom the Director has agreed to accept reports in a different format. Use of a consistent reporting format makes the data more meaningful for purposes of comparison and for evaluating the overall performance level of labor compliance programs, which is of particular interest to the legislature and other regulators outside this department.

Additional revisions to the language of this option were made as follows. In subsection (a), the words "final approval or" were deleted and the words "extended authority" retained in order to conform with revisions being adopted for section 16427, and the word "above" was added after the words "section 16427." In subsection (b), the format of a citation was revised to make the formatting more consistent and understandable.

Section 16432. Investigation Methods for Labor Compliance Programs – Definitions and Minimum Requirements, Including Review, Confirmation and Audits of Payroll Records; On-Site Visits; and Early Resolution of Audits.

In response to comments, the Director proposed the adoption of Option B from the two options that were presented with the initial proposals. Option B was chosen because its performance standards are more specific, more likely to result in prompt and proactive monitoring and enforcement that should reduce prevailing wage violations, more closely resemble the current practices of the Division of Labor Standards Enforcement and competent existing labor compliance programs, and more responsive to the concerns of the Legislative Analyst's Office about inefficient and ineffective enforcement by labor compliance programs. Conversely, the Option A standards were regarded as too lenient and potentially making it easier for dishonest contractors to evade enforcement. A weekly onsite monitoring requirement was retained as the most appropriate minimum standard, given the fact many subcontractors may be on site for a week or less.

In response to specific comments, the language of subsection (c) (describing the process of "confirmation") was revised to clarify that random confirmations must be undertaken for one worker per contractor per month rather than for every worker every month. In subsection (e) the phrase "Audit in the format set out in Appendix C" was changed to "Audit using the forms in Appendix C" simply to make the language simpler and more direct. At the same time, it should be noted that this is a safe harbor provision rather than a mandate to use those particular forms. In the first sentence of subsection (f), the word "may" was changed to "shall" so that programs will be mandated to give contractors an opportunity to resolve wage deficiencies before seeking approval of a formal enforcement action. This change is consistent with the best practices of some programs and gives programs and contractors alike the opportunity to resolve disputes quickly before incurring the expense of an enforcement action.

In subsections (b), (c), and (e), the format of citations was revised to make the formatting more consistent and understandable.

Section 16434. Duties of Labor Compliance Program.

In response to comments, the Director proposed the adoption of Option B from the two options that were presented with the initial proposals. Option B was chosen because it included a procedure and timelines for responding to complaints, provided a more specific set of directives for maintaining enforcement information (which tracks the information a labor compliance program is required to submit to the Labor Commissioner when requesting approval of a forfeiture), provided longer period for retaining records (based on statutes of limitations for individual prevailing wage claims), and included directives to the Labor Commissioner on providing training for labor compliance programs.

A sentence was added at the end of subsection (a) to set forth the Labor Commissioner's practice of using attorneys in prevailing wage enforcement appeals. The purpose of adding this sentence was to indicate that this is a strongly recommended though not absolutely mandatory performance standard, thereby discouraging the current practice of many labor compliance programs that use non-lawyers to represent them in these cases. In response to comments, the language of subsection (c)(2)(D) was substantially revised to clarify how prevailing wage rates are enforced for workers who are not duly registered as apprentices or when maximum apprentice ratio hours are exceeded. This language is intended to be consistent with applicable laws and the current practice of the Labor Commissioner, notwithstanding alternate theories on how prevailing wage requirements might be enforced in these particular situations.

In subsection (e), the format of a citation was revised to make the formatting more consistent and understandable.

Section 16435. Withholding Contract Payments When Payroll Records are Delinquent or Inadequate.

In subsection (b)(3), the format of a citation was revised to make the formatting more consistent and understandable.

Section 16435.5 Withholding Contract Payments When, After Investigation, It is Established That Underpayment or Other Violation Has Occurred.

A typographical change only was made in subsection (d).

Section 16436. Forfeitures Requiring Approval by the Labor Commissioner.

A typographical change only was made in subsection (a).

Section 16437. Determination of Amount of Forfeiture by the Labor Commissioner.

In subsection (a)(4), the Option A language was deleted and the Option B language retained to conform to the revisions in section 16432. The reference to section 16432 was also modified to refer specifically to subsection "(e)" of that section. Citation language in subsections (a)(9) and (e)(2) was revised to conform with other citation formatting, and a typographical change was made in subsection (e)(1).

A new proposed Appendix E was added at the end of section 16437 to provide a suggested format for a Request for Approval of Forfeiture. This form tracks all the information that must be presented with a Request for Approval of Forfeiture (as set forth in section 16437 and related provisions) and thus provides a convenient way for a labor compliance program to make sure that it is presenting all the necessary information.

Section 16439. Request for Review of a Labor Compliance Enforcement Action; Settlement Authority.

Citation language in subsection (a) was revised to conform with other citation formatting, and a typographical change was also made in subsection (a).

Further Revisions After 15-day Public Comment Period

Non-substantive revisions, including typographical changes, were made to the following sections after the 15 day comment period: 16404(e), 16421(c), 16422 [title and subsection (g)], 16423(f) [new], Appendix B [deleted], 16424, 16425, 16426, 16432, Appendix C [redesignated as B], 16434, Appendix D [redesignated as C], 16435.5, 16437, and Appendix E [redesignated as D].

Section 16404(e). A comma was inserted between the words "so" and "nor."

Section 16421(c). The word "government" was changed to "governmental" to conform to the terminology used in Government Code Section 87100 and the other regulations cited in this subsection as well as with the terminology used in proposed new subsection 16426(a)(9) and new section 16430 of these regulations. This change is considered non-substantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

Section 16422. In the heading, the word "Programs" was changed to "Program" to conform to the style used in other section headings. In subpart (g)(1), the words "awarding body's obligation to have a labor compliance program under any statute enumerated in Appendix B or any other state statute" were deleted and replaced with "awarding body's statutory obligation to have a labor compliance program that contains or meets the requirements of Labor Code Section 1771.5". This revision was made in light of the decision not to adopt a new Appendix B enumerating those statutes following section 16423, as

discussed immediately below. The revised language describes the statutes that had been enumerated in the proposed Appendix B, which instead will now be posted and updated regularly on the Department of Industrial Relations' website. This change is considered nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

Section 16423(f) [new]. In lieu of adopting a new Appendix B listing of statutes that require awarding bodies to have a labor compliance program as a condition of project authorization, project funding, or use of specified contracting authority, a new subsection (f) was added stating that the Director will maintain such a list on the Department of Industrial Relations' website. The change was made in response to a public comment and in recognition that the proposed list in the Appendix may be incomplete and could quickly go out of date as labor compliance program requirements are revised annually through new legislation. This change is considered nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

Redesignation of Appendices following Sections 16432, 16434, and 16437. In light of the decision not to adopt a new Appendix B following section 16423, the new Appendix following section 16432 was redesignated as Appendix B (the same as the Audit Record Form that currently appears in that location but is being repealed), the new Appendix following section 16434 was redesignated as Appendix C, and the new Appendix following section 16437 was redesignated as Appendix D.

Section 16424. The words "web site" were changed to "website."

Section 16425(f)(4). The words "Labor Compliance Programs" have been capitalized to conform to the style used for programs that are governed by these regulations.

Section 16426. In subpart (a)(8), the word "government" was changed to "governmental" to conform to the terminology used in Government Code Section 87100 and the other regulations cited in this subsection as well as with the terminology used in proposed new subpart (a)(9) of this section and proposed new section 16430 of these regulations. This change is considered nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1). In subpart (f)(4), the words "Labor Compliance Programs" have been capitalized to conform to the style used for programs that are governed by these regulations.

Section 16432. In the heading, the word "Programs" was changed to "Program" to conform to the style used in other section headings. In the third sentence of subsection (f), the second "furnished" was deleted. In the second sentence of subsection (e), a comma was inserted after the words "amounts paid" for grammatical style consistency.

Section 16434(b)(1). A comma was inserted after the opening phrase "Within 15 days after receipt of a complaint" for clarity and grammatical style consistency.

Section 16435.5. In the heading, the word "Or" was changed to "or' to conform to how it previously appeared when part of the hearing of section 16435.

Section 16437. The language of subsection (a) was modified to include a reference to Appendix D as a suggested format for the request for approval of forfeiture. This change is considered nonsubstantial and therefore not subject to a further public comment period per Government Code Section 11346.8(c)(1).

LOCAL MANDATES DETERMINATION

These regulations impose no mandates on local agencies or school districts. In making this determination, the Director relies on factors cited in the Notice of Proposed Rulemaking and previous determinations made in connection with the amendment of these regulations in 2004. By way of explanation the Director further notes that no local agency or school district is compelled to adopt a labor compliance program except as a condition for obtaining certain bond construction funds (*see, e.g.*, Labor Code Sections 1771.7 and 1771.8) or to exercise other optional authorities such as the design-build method for certain public works construction projects (*see, e.g.* Education Code Section 17250.30 and Public Contract Code Section 20133). These statutes further specify that a public agency may contract with a third party to act as its labor compliance program rather than adopting its own program. The Director also notes that Labor Code Section 1771.7(e) provides additional funding for the operation of a labor compliance program in connection with projects funded by the Kindergarten-University Public Education Facilities Bond Acts of 2002 and 2004, and that over 90 percent of all approved labor compliance programs were established either by school districts or by third parties that contract with school districts to comply with the labor compliance program requirement in Section 1771.7.

Labor Code Section 1771.5(b) specifies some necessary components of a labor compliance program, and Labor Code Section 1771.5(c) further specifies that a labor compliance program must be approved as specified in state regulations adopted by the Director. These amendments modify and clarify existing regulatory standards.

SUMMARY AND RESPONSE TO COMMENTS:

In accordance with Government Code Section 11346.45, a set of draft regulations was circulated among persons who would be subject to or directly interested in the subject of the regulations, and written responses were received from representatives of labor compliance programs, unions, contractors, and school districts. These responses were considered in drafting the proposals published with the Notice of Proposed Rulemaking, but are not the subject of further summary or response here since they predated the formal rulemaking.

During the public comment period, the Director received comments in response to the proposals either in writing, orally at the public hearing, or both, from the following individuals and entities: John Young; Southwest General Contractors, Inc. [Southwest]; California Department of Trans-

portation [Caltrans]; Keenan and Associates [Keenan]; WCS/Ca; Association of Labor Compliance Professionals [ALCP]; LCPTracker; Contractor Compliance & Monitoring, Inc. [CCMI]; The California State University, Office of the Chancellor [CSU]; California's Coalition for Adequate Housing [CASH]; Construction Employers Association [CEA]; City of Los Angeles Department of Public Works, Bureau of Contract Administration [City of LA]; Parsons Brinckerhoff Construction Services [Parsons]; CalLCP.com; Dante John Nomellini, Jr. [Nomellini]; James Reed on behalf of Labor Compliance Providers, Inc. and the Center for Contract Compliance [Reed]; Los Angeles Unified School District Facilities Services Division [LAUSD];[1] Best Best & Krieger LLP on behalf of San Diego County Office of Education and others [Best Best]; Western Electrical Contractors Association, Inc. [WECA]; School Construction Compliance, LLC [SCC]; The Solis Group [Solis]; San Francisco Unified School District LCP [SFUSD]; the State Building and Construction Trades Council [SBCTC]; Diane Ravnik; and the Work Preservation Fund [WPF].

Following the close of the initial comment period, an additional comment was received from the President of the Association of Labor Compliance Professionals that was incorporated into the further revisions that were circulated for an additional public comment period.

During the additional public comment period provided after the issuance of the further revisions, written comments were received from the following individuals and entities: Dante John Nomellini, Jr. [Nomellini]; Los Angeles Unified School District Facilities Services Division [LAUSD]; California's Coalition for Adequate Housing [CASH]; Association of Labor Compliance Professionals [ALCP]; California Department of Transportation [Caltrans]; Contractor Compliance & Monitoring, Inc. [CCMI]; and City of Los Angeles Department of Public Works, Bureau of Contract Administration [City of LA].[2]

Late comments were also received from Ezequiel Arvizu and the California Organization of Small Business Officials. These late comments are included in the rulemaking record but not separately summarized or responded to below. However, the issues raised in these late comments are addressed in responses to the other comments below.

The comments and responses are grouped by topic and section as indicated in the page number index below. Within each subject, comments and responses are also divided between the initial proposals and the further revisions. Comments designated as "oral" means that they were provided during the public hearing on January 23, 2008, and are distinct from the written comments that the same individual or entity may have presented. Comments designated as "written and oral" means that the summary incorporates related points raised by a commenter in both written

[1] LAUSD also attached a copy of the comments it had submitted previously when draft proposals were circulated earlier in 2007. Some of those earlier comments were incorporated into the proposals that were issued when the formal rulemaking commenced on November 30, 2007. Of the earlier comments in the attachment, only those items that were not incorporated into the formal proposals are summarized and responded to below.

[2] Although the Notice of Modifications to Text of Proposed Amendments asked that additional comments be "limited to the modifications to the text of the proposed regulations," several of the commenters attached or restated comments that were submitted previously. Only those additional comments that were directed to the modifications are summarized and responded to here.

and oral comments. On the other hand, oral comments that essentially were identical to written comments are not separately noted.[3]

Comment on Costs or Savings to State Agencies:

Caltrans: Caltrans is the only state agency with an approved LCP and estimates that it will be required to add 28 enforcement positions at a cost of approximately $2 million annually if Option B is adopted as written in section 16432 and 16434.

Director's Response: Caltrans' comments on the Option B proposals for sections 16432 and 16434 indicate that Caltrans is projecting additional costs based on the following activities: (1) reviewing certified payroll records within thirty days, (2) confirming payroll records though comparison with other sources of information; (3) informing complaining parties about the status of their complaints; and (4) maintaining project data on the project report form [Appendix to section 16434]. However, Caltrans' testimony at the public hearing on the proposals and a review of its current complaint procedure indicate

[3] The term "labor compliance program" is often reduced to its acronym "LCP." If the acronym was used in a comment, it also appears that way in the comment summary below.

that its current practices already meet the proposed payroll review and complaint handling standards. The language on "confirmation" was revised to clarify that it will require random confirmation of some payroll report data rather than blanket confirmation of all payroll report data. This simply makes more specific what currently falls within the scope of random audits under the existing regulation. Finally, there is no mandate to use or transfer data to the suggested project report form. It is simply a suggested format that tracks statutory duties and the information required for a Request for Approval of Forfeiture (section 16436). Through enforcement cases presented through the Labor Commissioner and enforcement appeals before the Director under Labor Code §1742, Caltrans has demonstrated that it already maintains the necessary information. The Director stands by his initial determination that the proposals will not result in increased costs to any state agency.

Comment on Economic Impacts on Business and on Representative Private Person or Business:

Caltrans: Caltrans will be forced to pass on many of the additional reporting requirements to its contractors causing an increase in administrative costs for payroll handling and reporting. In addition to local agencies and school districts, these proposals will also directly affect Caltrans, which urges the Director to exempt awarding body LCPs with "extended authority" or contracts exceeding $1 billion.

Director's Response: For reasons discussed under the preceding comment, Caltrans will not have additional costs or reporting responsibilities that it will need to pass on. Caltrans' other comment is not responsive to the determination regarding impacts on a representative business or person in the private sector. However, as a labor compliance program with final approval, which will become extended authority under these proposals, Caltrans will be exempt from reporting formats that may be required for other programs. The Director stands by his initial determinations on economic impacts on business and on a representative private person or business.

Comment on Effect on Small Business:

Caltrans: Additional requirements for validating prevailing wage payments and increased enforcement will apply to all contractors of any size.

Director's Response: The Director has prescribed more specific requirements, consistent with the current practices of longstanding programs like Caltrans, rather than a new set of tasks. The misperception about the extent of "confirmation" required under the Option B proposal for section 16432 was addressed by revising that language. For the reasons discussed in the preceding comments, Caltrans' responsibilities and costs will not be increased, and thus Caltrans will not have to pass on additional requirements to contractors. The Director stands by his initial determination on the effect on small business.

Comments on proposals in general and uncategorized comments:

John Young: 1. Adopt minimum quarterly payments for Health/Welfare/Pension/other as the Department of Labor presently requires. 2. Change the State regulations to conform with the DOL DBRA handbook, especially 15f10 (b), which does not allow Davis Bacon projects to fund the contractors' benefits exclusively. 3. Mandate that contractors submit a converted annualized hourly dollar cost for providing health and welfare benefits and not just a fringe benefit statement showing they are deducting what is listed in the prevailing wage determination.

Director's Response: These suggestions may have merit but are outside the scope of these proposals, which pertain to the regulation of labor compliance programs and not the obligations of contractors on public works projects in general. These suggestions may also require statutory changes.

Southwest: My comment concerns IDENTITY THEFT / FRAUD and CERTIFIED PAYROLL REPORTING requirements, and the lack of LCP accountability and guidelines directing the LCP on how to process the personal information of others in a secure and protective manner. LCPs should be controlled, regulated, and held accountable. The LCP should be able to produce written and approved procedures detailing how they handle the personal information of others and those procedures should be in accordance with DIR established requirements. DIR should be able to produce audit results proving that an approved LCP is in compliance with DIR approved procedures.

Director's Response: The Director notes that all governmental agencies and all employers are subject to laws that govern the privacy of personal information, including social security numbers, and that those laws provide sanctions and remedies for violations. The LCP regulations assume that labor compliance program personnel are aware of laws of general applicability and are willing to comply with those laws and assume liability for the consequences of noncompliance. It would not be feasible to incorporate or reiterate every such law within this specific set of regulations governing labor compliance programs, nor would such an effort be permitted under the "nonduplication" standard of Government Sections 11349(f) and 11349.1(a)(6) (requiring that a proposed regulation not serve the same purpose as a federal or state statute or another regulation). The current regulations address information practices in section 16421(c), with a further reference in section 16426(a)(8), for the specific purpose of informing private third party labor compliance programs that they have the same responsibilities as a governmental agency in terms of how they maintain, disclose, or keep confidential the records that come into their possession or under their control as a labor compliance program. However, to say more or to adopt the aggressive policing standard suggested by the commenter would violate the "nonduplication" standard and would not be feasible, given DIR's limited resources and authority, nor warranted by experience. No specific violations of the type suggested by the commenter have been brought to the attention of the Director in recent years; however, if such a complaint were made and substantiated, the Director's only available sanction would be to revoke or restrict that program's approval as a labor compliance program. By contrast, the Information Practices Act provides far more substantial and direct sanctions and remedies for these kinds of violations.

Keenan: 1. More emphasis should be placed on the educational role of LCPs and less on negative criteria. Our school district clients expect us to be prevailing wage consultants and not the LCP police. 2. We were encouraged by the Director's statement at a recent public meeting that the Department of Industrial Relations should implement technological solutions whenever possible. LCPs should follow his lead and be prepared – indeed required – to offer on-line and web-ex options to enhance our educational role.

Director's Response: The Director disagrees with the first suggestion, which misperceives the intended and expected role of labor compliance programs. The fundamental role and purpose for labor compliance programs is to enforce prevailing wage laws. In Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, *the court noted that "The overall purpose of the prevailing wage law … is to benefit and protect employees on public works projects."* (Id. at p. 987 [citations omitted].) *The court further recognized that "both the awarding body and the contractor may have strong financial incentives not to comply with the prevailing wage law." (*Id., emphasis added.*) Labor compliance programs doing enforcement on school bond construction projects since 2003 have had a very poor track record, as documented in the Legislative Analyst's Office Analysis of the 2007-08 Budget Bill, Capital Outlay Chapter (February 21, 2007) pp. 14-15 [addressing labor compliance programs]. A significant factor contributing to this poor track record has been the unwillingness of some programs to use enforcement tools because they are trying to please school district clients or because they perceive their role as primarily educational. While it is important to remind contractors of their obligations, prevailing wage requirements have existed for over 75 years, and there are many experienced public works contractors who are already familiar with those requirements. When there is no enforcement and no penalty for violations beyond the obligation to repay what was due in the first place, unscrupulous contractors have no disincentive against underpaying workers.*

Keenan's second suggestion refers to a general objective of the Department of Industrial Relations going forward, though not something the Director has considered imposing on labor compliance programs. Because this general suggestion is beyond the scope of these proposals, no further response is required.

LCPTracker: Software technology like LCPTracker and others are now widely available, free to contractors, and fix many of the issues now being discussed in the industry regarding standardization of data, payment of proper rates, electronic documentation, automatic reporting, selection of proper craft or classification per county, submission of CPRs via the web, validation check of paid prevailing wages for each employee, ratio checks for apprentice crafts, annual reporting, and more. The DIR should consider technology already on the market and its impact on the entire process, and how much it can improve the state Labor Compliance Programs.

ALCP (oral): We have no objection to technology except when it becomes mandatory. Large contractors that have their own systems object when required to change. Use of technology should be a choice, which the local agency can make a contractual requirement.

We've seen no system that provides substantial assistance with regard to classification errors. That requires field inspection and observation and checking critical documents. However, some program personnel whom we've had to review afterward have thought that doing a software rate check is the entire job of labor compliance.

LCPTracker (oral): Software is a tool to reduce the administrative work. Administrators still have to do their due diligence and follow-up and make sure the right crafts are being selected and the right apprentices . . . The software is an excellent took to check on whether they are using too many apprentices and can be used to cross-check on holiday pay. It can also be used as a tool to find the problems -- interviews can be automatically mapped to the certified payroll for the week.

SFUSD (oral): Some software may not be linked into the wage determination, so it is still the ultimate responsibility of the labor compliance program administrator to confirm that software interpretations are correct.

Director's Response: The Director applauds any technologies or methodologies that make labor compliance enforcement more efficient and effective. However, it is outside the scope of these proposals and not DIR's role to endorse commercial products or technologies as the best or most appropriate vehicle for performing this work. DIR has an ongoing concern over labor compliance program personnel who believe that software like LCPTracker accomplishes all the necessary tasks of labor compliance enforcement. Such software may be able to guarantee proper treatment of data, ensure accurate calculations, and identify of red flags raised by the data, in the same manner as tax reporting software. However, it cannot guarantee the validity of the information that is input into the system. Prevailing wage violations often arise out of the misclassification of workers as well as the underreporting of hours worked or misrepresentation of wage payments made, none of which can be detected by software without resort to interviews or other hands-on investigative methods incorporated into the proposed revision of section 16432.

CASH: Include a provision to allow for awarding bodies that have DIR-approved LCPs to enter into memorandums of understanding that enable them to share information collected and compiled by the LCPs similar to the authority provided by entities within a joint powers authority for purposes of monitoring potential manipulation of workers' pay rates between projects awarded to the same contractor by different public agencies.

LAUSD: A provision should be adopted that would allow for awarding bodies that operate DIR-approved LCPs to enter into memorandums of understanding that would enable them to share information compiled by their LCPs for the purpose of monitoring potential violations by contractors working on projects of both awarding bodies.

Director's Response: This suggestion is outside the scope of these proposals and was not accompanied by any suggested regulatory language. It also is not clear whether this is an appropriate subject for DIR regulation. Nevertheless, the concept has merit and is being studied further by DIR.

Keenan: It should be an LCP's obligation to list clearly exactly what their clients will be provided for the fees they pay. We also believe that LCPs should be required to specifically list the cost of their service.

SCC (written and oral): Some third-party LCPs are being awarded contracts for sums so low that it is unfathomable to conceive proper enforcement is being effectuated. . . . We feel that there is a dire need for more comprehensive oversight of all operating LCPs.

Director's Response: DIR does not currently regulate specific contractual relationships between awarding bodies and third-party labor compliance programs, and some contend that DIR lacks authority to do so. From a practical standpoint, DIR presently also lacks the capacity to evaluate contracts or fee schedules or set minimum standards for contracts and fees. The existing mechanism for regulating labor compliance programs is and for the time being will continue to be through approval and revocation. Programs that fail to meet minimum performance standards may be subject to revocation, and programs that provide less than complete services may place their approval status in jeopardy, even if due to contractual restrictions imposed by the awarding body.

Nomellini: The regulations should be amended to allow, to the extent they do not already currently allow, reclamation districts to take advantage of the exemptions in Labor Code Section 1771.5. Apparently, this can be accomplished by at least two methods as follows: 1. The Regulations should allow Awarding Bodies to elect "All Project" status by contracting with a third party that operates a Labor Compliance Program which covers all such projects. 2. If DIR disallows the foregoing method, then the Regulations should be amended to allow Awarding Bodies to establish their own Labor Compliance Program but hire the services of a third party to carry it out.

Director's Response: The exemptions in Labor Code Section 1771.5(a) are governed by the language of that subsection, which specifies that the exemptions are available "if the awarding body elects to initiate and enforce a labor compliance program . . . for every public works project under the authority of the awarding body." This means that only the awarding body itself is eligible for the exemption based on enforcing labor compliance on all of its public works projects. The regulations do not prohibit an awarding body from hiring consultants to operate the awarding body's own approved program or contracting with another approved program for LCP services, provided that all notice requirements specified in section 16423 are met and the program is used to enforce compliance on all *of the awarding body's public works projects. Though DIR has offered conflicting information on this subject in the past, further amendment of the regulations appears unnecessary.*

ALCP (oral): The task of improving and strengthening the regulatory requirements governing labor compliance programs could not be more important. The experience of the past four years has made it clear that a permissive regulatory environment, while potentially providing useful latitude to a self-policing high-functioning LCP, may all too often provide opportunity and encouragement to an intentionally underperforming or nonperforming LCP to simply occupy the ground, but do little in the way of monitoring and enforcement.

This rulemaking will provide the core objective standards upon which disciplinary proceedings against LCPs will depend. We encourage giving great weight to specific proscriptive standards in these regulations.

Director's Response: No response required.

SBCTC (oral): 1. DIR should establish a fee schedule to help fund oversight of the LCPs. 2. It would be valuable for DIR to establish some kind of regular semiannual or quarterly meeting with LCPs that are interested in doing so to share information and best-practices. Our own labor union compliance programs would also like to participate in that because they don't believe LCPs share a lot of information that they should.

Director's Response: While DIR needs resources to fund oversight, it is not clear that it has the authority to establish a fee schedule for that purpose. The Director agrees generally with the second suggestion. In the past year, the Director has revived the Director's Advisory Committee on Public Works (formerly the Public Works Advisory Committee) and would like to convene an LCP specific group. Unfortunately current budgetary problems may delay DIR's ability to establish such a group or conduct meetings as frequently as suggested.

Comment on proposals in general and uncategorized comments after April 4, 2008 revisions:

Nomellini: In my review of the modifications I also noticed that section 16421, subd. (b), seems to authorize an awarding body to operate its OWN LCP, but hire persons skilled in such operation, to handle such operation. If an awarding body can do that for an "all projects" LCP, then it seems an awarding body should also be able to contract for a third party to initiate and enforce its entire LCP (in lieu of the awarding body initiating and enforcing its own LCP). I again request that that the regulations be modified to make it crystal clear that an Awarding Body may contract with a third party to initiate and enforce an "all projects" Labor Compliance Program for the Awarding Body (to the extent the DIR believes it is not already crystal clear or believes such an arrangement is currently not allowed).

Director's Response: A complete response is provided above in response to Nomellini's initial comments on this same issue. The Director has not proposed revising any of the relevant regulatory language, and no specific revisions have been suggested.

Comments on certified payroll records and related forms and section 16401:

Southwest: Full social security numbers should not be disclosed on certified payroll records. It is an unnecessary risk, irrelevant for purposes of a payroll audit, and not recommended under Civil Code Sections 1798.85 – 1798.86.

CalLCP.com: 1. The proposed regulations do not address the need to modify the format and content of Certified Payroll Records (CPRs) under 8 CCR §16401. This is an impor-

tant issue due to the proposed addition of §16404 (electronic payroll records). It is essential that the basic CPR format and content language under §16401 be updated during this regulatory revision process. Clarification of §16401 should result in a regulation which facilitates a level playing field for contractors by standardizing an efficient and clear method by which they can report their wage and fringe benefits and an efficient enforcement guide to LCPs or other compliance professionals reviewing these payrolls. [The commenter offers specific suggestions for amending the language of §16401 and recommends modifying the current certified payroll record form (A-1-131).] 2. All references throughout the regulations to payroll records pursuant to Labor Code §1776 should also include a reference to the regulations §§16401-16404 in order to assist untrained LCP personnel in their knowledge regarding CPRs.

SCC: Social Security numbers on certified payroll records are necessary, and more bold or specific regulatory language should be adopted to 1) stipulate the need for each employee's complete social security number on each certified payroll record where their hours are reported, and 2) differentiate between the requirements of Labor Code Sections 1776 and 226. In this day and age of identity-theft, several contractors are citing Labor Code Section 226 to contest the requirement for putting complete social security numbers on certified payroll records.

Director's Response: These suggestions are outside the scope of these proposals. The information required on certified payroll records is governed by statute, specifically Labor Code Section 1776, and the Director does not have the authority to change statutory requirements by regulation. Additionally, while proposed section 16404 acknowledges and places appropriate restraints on the existing practice of transmitting payroll records electronically, proposals to amend the required contents of certified payroll records go well beyond the regulation of labor compliance programs, affecting the obligations of all contractors on public works. CalLCP.com's additional suggestion about adding regulatory references to assist untrained program personnel was not accepted because (1) program personnel should have sufficient training to know where to find certified payroll requirements and not assume that all relevant information is necessarily contained in any isolated reference, and (2) such redundant referencing is contrary to the nonduplication standard set forth in Government Code Section 11349(f).

Comments on section 16404 in general:

Caltrans, ALCP, City of LA, and LAUSD: Generally support the addition of this section.

CalLCP.com: Without recommended changes in §16401 (above), proposed §16404 will only add more complication to the already poor general understanding regarding the completion and analysis of payroll records and further encourage inaccurate payroll reporting by unscrupulous contractors.

CASH: Supports electronic reporting but notes that regulation provides no enforcement measures and recommends adding language to clarify that the LCP is responsible to re-

view, investigate and audit in accordance with Section 16432.

CEA (oral): 1. Contractors' main gripe with electronic submission of payrolls is duplication of work. 2. Because general contractors are jointly liable for wage violations, they would like to get subcontractor electronic submissions, even before they are submitted to the LCP.

SFUSD (oral): It's important that whatever documentation is submitted online remain available for a minimum of three years after that. Programs also want to be able to audit whatever the contractors send in.

Director's Response: Proposed section 16404 acknowledges and places appropriate restraints on the existing practice of submitting certified payroll records electronically. This proposed regulation is in a separate subchapter on certified payroll requirements, and a reference to labor compliance program obligations under section 16432 would be out of place and redundant to section 16432. Labor compliance program personnel are expected to be familiar with all regulations that directly pertain to their responsibilities and should not assume that all relevant information is contained in one isolated regulation. It is not necessary to mandate electronic submission of certified payroll records by subcontractors to general contractors, since the general contractors who want to do so can require this by contract. With regard to SFUSD's suggestion, this proposal does not affect any document retention requirements that otherwise apply.

Comments on section 16404(a):

CEA: Insert "and Statement of Employer Payments, Form PW 26" after "(Form A-1-131)" because this form is also required by the Division of Labor Standards Enforcement and LCPs when requesting certified payroll records.

SCC (written and oral): We run into problems with contractors who have their own in-house software, and suggest adding language indicated in bold so that the adequacy of the payroll record is dependent on including the Form A-1-131 data elements.

> "The reports must contain all of the information required by Labor Code Section 1776, with the information organized in a manner that is similar or identical to how the information is reported on**, and inclusive of the information required on,** the Department of Industrial Relations' suggested "Public Works Payroll Reporting Form" (Form A-1-131) . . ."

Director's Response: While the suggestions are intended to be helpful, they would add respectively a substantive specification and an additional substantive requirement to a proposal pertaining to an alternate method for transmitting certified payroll reports. The content of certified payroll reports is governed by Labor Code Section 1776 and section 16401 of the regulations, and this proposed section 16404 is not an appropriate place to try to revise, refine, or add to those requirements.

Comment on section 16404(c):

CEA: Revise "(2) printed out and submitted on paper with an original signature" to "(2) printed out and submitted on paper with **a copy of a signature**" because Labor Code Section 1776 does not require an original signature, and specifically refers to "A certified copy of all payroll records".

Director's Response: This comment confuses the records, which may be copies, with the certification, which must be in a form that legally binds the person who makes the certification. The submission of a printout with an original signature is an alternative to item (1), which is transmitting a non-modifiable image or record electronically with an electronic signature or copy of the original certification on paper. The intent in either case is to require transmission of a record with a certification that cannot be altered or disavowed later by the person making the certification.

Comments on section 16404(e):

CCMI: Add the words "send or" before the word "receive."

CEA and SCC: Add the words "submit or" before the word "receive."

Director's Response: The suggestion was accepted as consistent with the purpose and intent of the proposal, and the words "submit or" were added.

Comments on section 16421 in general:

WCS/Ca and City of LA: Support revisions to body of regulation.

Comments on section 16421(a)(2):

Keenan: We are strong proponents of the importance of upfront contractor education, and we are disappointed that more emphasis is not put on education in the proposed changes. As the single most important component of ensuring prevailing wage compliance on any project, an LCP's duties at the pre-job conference should be more clearly and emphatically spelled out and should involve more than just a discussion of appropriate labor laws and a furnishing of required forms.

Keenan (oral): We advocate taking administrative burden away, not only from school districts, but also from DIR with less requests for forfeitures and underpayments, by placing emphasis for labor compliance at the preconstruction meeting, and taking a more consultant educational approach to the contractors. We go as far as mandating that every contractor, prime and subcontractor, attend a preconstruction meeting. The way we do things,

we're able to settle any disputes on an informal basis prior to going to the DIR.

ALCP (oral): We recommend that contractors having recently attended a pre-job conference and still have their materials be able to sign the "acknowledgement sheet" and not have to sit through the whole pre-job conference again.

LAUSD: Request modification to allow awarding bodies to satisfy the pre-job conference requirement through electronic/internet-based means which would be available at the District website to no cost to the public and required prior to the submission of the electronic certified payroll. The "virtual" prejob conference would (1) include a discussion of all applicable federal and state labor law requirements, (2) make all suggested forms available for downloading, (3) provide a dedicated phone number where any questions can be answered, and (4) provide for an electronic checklist and contractor certification with specified agreements.

SCC (written and oral): Because many successful bidders are awarded more than one contract by the Awarding Body during the same time period, the requirement for attendance should be specified to allow for only the certification of Appendix A and receipt of Labor Compliance Program meeting documents to be required if, considering the above circumstance, one conference has already been attended within that time period.

Director's Response: The Director did not propose to amend this subsection, which is based on the requirements of Labor Code Section 1771.5(b)(2), and has been in the regulations since 1992. For reasons discussed under the general comments above, the Director does not agree with the suggestion to place greater emphasis on education and deemphasize enforcement. No text was proposed, and there is no evidence that an express regulatory mandate is needed to include a discussion of the role of the labor compliance program in prejob conferences. Regarding the suggestion on virtual prejob conferences, there is no express prohibition against such a format in the existing law and regulation, as long as it can be structured to meet the intent, purpose, and requirements of the existing regulation. Regarding contractor attendance at prejob conferences, the current regulatory language does not specify that a contractor must attend a separate conference for every individual job, although a prime contractor should always have someone there as a resource to help explain requirements to subcontractors as well as to review information on its own behalf. Another important concern is that non-participation for whatever reason should not be offered or accepted as an excuse for a contractor's subsequent failure to comply with prevailing wage requirements.

Comments on section 16421(a)(3):

LCPTracker: Require weekly submission of certified payroll records, which is consistent with weekly payroll required by Labor Code §§1771.5(b)(3) and 1776(a) and more cost-effective for contractors. Requirement to collect certified payroll records monthly appears to conflict with these statutes as well as proposed requirement for quarterly collection in proposed §16432, Option A.

CCMI: Add the words "Labor Compliance Program" after "Awarding Body" at the end of the first sentence.

Reed: At the end of the first sentence add the words "or the Labor Compliance Program."

SCC (written and oral): Require certified payroll records to be submitted at least biweekly or preferably weekly because sometimes discrepancy between work performed, as indicated in field interview, and classification used by contractor does not come to light until CPR submitted and reviewed over a month later.

Director's Response: These suggestions were not accepted. There is no conflict between the statutes, which require a weekly and even daily breakdown of work (that is necessary to determine overtime entitlements), and the proposed regulatory requirement concerning how frequently those records must be furnished to or collected by the labor compliance program. Because the Option A language for section 16432 was not adopted, there also will be no conflict with that section. The language of this proposal was carefully chosen to clarify that there are two submission standards – one for regular submissions to the labor compliance program that shall be designated by contract and shall be "at least" monthly, and the other for separate submissions within 10 days of a special request by the awarding body. The language sets minimum standards without precluding contractual agreements that would require more frequent submissions or authorize a labor compliance program to make separate special requests on the awarding body's behalf. A program also retains the option to inspect the records at the contractor's principal office at any reasonable time, as provided by Labor Code Section 1776(b). The need for even more stringent across-the-board standards for furnishing records has not been shown.

Comments on section 16421(a)(6):

CEA: Amend language as follows to conform with requirements provided in §16435(e):

> "All contracts to which prevailing wage requirements apply shall include a provision that contract payments, ***equal to an estimated penalty against a contractor or subcontractor whose payroll records are delinquent or inadequate***, shall ~~not~~ be ***withheld*** ~~made when payroll records are delinquent or inadequate~~.

LAUSD: Clarify the term "contract payments" which shall not be made. As is, the provision might refer to all further contract payments on the entire contract, all contract payments while payroll records are delinquent, or contract payments encompassing the time frame of the delinquent payroll records.

Director's Response: These suggestions were not accepted. The Director did not propose to amend this subsection, which is based on the requirements of Labor Code Section 1771.5(b)(5), and has been in the regulations since 1992. The clarifications sought by the commenters have been made in section 16435, and program personnel should be familiar

with those limitations on withholding for delinquent or inadequate payroll records. It is not necessary or desirable to reiterate every requirement in every regulatory subsection.

Comments on section 16421(b):

CCMI: Objects to public entities contracting labor compliance services to an architectural or engineering firm who has not obtained independent LCP approval because few architects or engineers are thoroughly familiar with prevailing wage requirements relating to training contributions.

Reed (written and oral): Words "enforce all or part" in line 3 and in new section 16430 may conflict with new language in §16423(a) "unless it fully contracts".

Director's Response: These suggestions were not accepted. The Director did not propose to amend this subsection, which was added in 2004. The exception for certain licensed professionals is for individuals rather than firms. It is generally true that most licensed professionals, including many lawyers who represent construction contractors, are not thoroughly familiar with all prevailing wage requirements. However, because such individuals are separately licensed and regulated under standards of competence appropriate to their professions, they should not require separate DIR approval to provide LCP-related services to an awarding body that is itself an approved labor compliance program and, as such, subject to the standards of performance and competence set forth in these regulations. The words "enforce all or part" are within sentences referring to or clarifying the authority of awarding bodies and joint powers authorities to contract for labor compliance program services. The language of section 16423(a) serves a different purpose, which is to clarify when an awarding body is or is not required to have its own separately approved labor compliance program, which is a subject that has been a source of continuing confusion among awarding bodies. Thus, the different language used in these sections does not conflict.

Comments on section 16421(e):

Caltrans: 1. It would be helpful to have clear direction as to what comprises "reasonable, vigorous, and prompt" action, which is vague and subjective. Caltrans suggests language similar to the requirements set forth in Labor Code 1771.5, requiring LCPs to perform specific duties as an approved program. 2. The term "prolonged or excessive withholdings of contract payments" also is vague and uncertain. While we recognize that DIR may be trying in this section to provide flexibility to LCPs because each case comes with its own set of difficulties, it would be helpful to have objective guidelines. Caltrans has contract durations anywhere from 15 days to 1,000 days depending upon the complexity and type of contract, and evaluates every contract on a case by case basis with regard to the extent of time allowed for contractors to effectuate compliance. In most cases, Caltrans achieves compliance within sixty days of the withholding of contract payments, with the process of seeking formal enforcement beginning only if compliance is not obtained in that time. While Caltrans does not believe the withholds are objectively "prolonged and excessive,"

the proposed regulation leaves our LCP procedures open to interpretation.

ALCP: We endorse and appreciate this vigorous and more detailed expression of the expectations of the State in regard to the role and function of an LCP.

CASH: Delete "reasonable, vigorous, and prompt" and delete the last two sentences of this subsection in their entirety. The terms "reasonable, vigorous, and prompt" are ambiguous. Furthermore, school districts have explicit authority under the Public Contract Code and Education Code governing contracts for public works projects, including enforcement measures such as withholding contract payments as specified in their individual contracts. The proposed amendments encroach on this authority provided by other governing statutes; therefore, we ask that they be removed from the proposed regulations.

LAUSD: The terms "prolonged" and "excessive" are vague and subject to interpretation. The District request that these terms be further defined. As is, the proposed sentence will create confusion and unnecessary complaints to the DIR from contractors for withholdings that are legal and reasonable.

Reed: In line 6 insert the words "investigation or interview" between the words "enforcement" and "authority".

Director's Response: The words in this proposal were carefully chosen to address widespread concerns with program performance over the past four years, including with programs that believe enforcement is not part of their core mission or that a contractor's grudging compliance with requests for records or reimbursement of underpayments, no matter how long delayed, is always sufficient to avoid penalties or enforcement. The term "vigorous" was drawn from Labor Code Section 90.5(a), which expresses the public policy of this state on labor standards enforcement. The terms "reasonable" and "prompt" should be understood in a common sense fashion and in reference to their converse terms; in other words, a program should not take "unreasonable" action nor should it prolong determinations or the taking of enforcement action. As Caltrans suggests, the language is flexible enough to account for the difficulties of each individual situation. DIR does not address individual complaints in such matters except in the context of a prevailing wage enforcement appeal under Labor Code Section 1742 or a complaint for revocation of approval of a labor compliance program, in which case the Director would look either for an especially egregious violation or a pattern of poor performance rather than an isolated case that may involve conflicting interpretations of fact or law. The language on excessive or prolonged withholdings addresses an issue raised but not resolved in the 2004 amendments. It should be understood in conjunction with the proposed revisions to section 16435, particularly the new subsection (e) of that section, which prescribes limits on withholding. With regard to CASH's objection, the Director is not trying to proscribe or usurp contracting authority under other statutes, but is defining parameters for using the statutory withholding authority conferred by prevailing wage laws. These different authorities may overlap in some respect, but neither should be used as a weapon to gain compliance in the other area or put contractor remedies out of reach. Finally, Reed's suggestion was

not accepted because the language in question is directed toward taking formal enforcement action, which many programs have been reluctant to do, rather than the conduct of investigations and interviews, which have not met the same resistance and are addressed in amendments to section 16432 that set forth more specific performance standards.

Comments on Appendix A following section 16421:

WCS/Ca: 1. Agree with addition of item (14). 2. Add additional items on Revenue and Taxation Code withholding requirements, penalties for contractors that violate immigration laws, and Unemployment Insurance Code violations and related penalties for failing to report or making false reports to the Employment Development Department, particularly with respect to withholding of payroll taxes.

ALCP: Addition of item (14) is highly advisable.

CCMI: 1. Amend item (3) by adding reference to overtime penalties under Labor Code §1813. 2. Delete item (10) reference to Business & Professions Code §§17200-17208, due to conflicting court interpretations and lack of DIR guidance on what to discuss. 3. Add an additional item (15) "Electricians must either be Journeyman Certified by the D[ivision of] A[pprenticeship] S[tandards] or hold Journeyman-Trainee or Apprentice status with the DAS in order to work on any public works project."

CEA: Delete items (12) [OSHA laws applicable to project] and (13) [employment of undocumented workers], as they are not relevant to prevailing wages and not minimum labor standards subject to enforcement under Labor Code §90.5.

Parsons: Clarify whether the new item (14) on wage stub requirements under Labor Code §226 means that a program must provide contractors and subcontractors with prevailing wage rates specific for the "Project."

SBCTC (oral): Certification for employees of electrical contractors should be added to the list.

SFUSD (oral): I support an item on certification of electricians. However, there is a perception that there is no power behind requesting that electricians be certified. If electricians are asked to be certified, then LCPs should get the backing from DIR to enforce that.

Caltrans (oral response to proposal by others): LCPs do not have the authority to enforce certification for electricians, and whether or not they're certified does not alter the rate of pay that they are entitled to be compensated; so Caltrans would not like to see this subject addressed in the LCP regulations. Because we can't enforce that, discussing it just adds to the confusion.

Director's Response: The Director did not propose to revise the list in Appendix A, other than adding the new item on Labor Code Section 226, which concerns the duty of all em-

ployers to provide individual wage statements to employees, and conversely does not concern providing contractors or subcontractors with wage rate information. This particular item was added because it is an important statute that has been revised several times in recent years, and because wage stub violations are frequently associated with prevailing wage complaints and violations (as well as complicating the process of determining the extent of those violations). Otherwise, this Appendix, which is a "suggested" list of labor law requirements to review rather than a detailed or comprehensive list, was left unchanged. No labor compliance program is precluded from discussing other items or discussing any individual item in greater detail than may be indicated on the Appendix. The danger of trying to make this list more detailed or comprehensive would be the undue significance that might be attached to any perceived omission. For this reason WCS/Ca's suggestions and CCMI's suggested addition to item (3) were not accepted, although it certainly is appropriate to cover those items in a pre-job conference. The recommendations to add an item on electrician certification standards also were not accepted because the ability to still use non-certified electricians on the job site and lack of an enforcement mechanism would tend to make any discussion of this subject more a source of confusion than clarification. CCMI's suggestion to delete or clarify the reference to the unfair competition law (UCL) is rejected now, as it was in the 2004 rulemaking, because UCL violations may be predicated on labor standards violations, and a UCL claim can extend the statute of limitations for wage violations to four years. CEA's suggested deletions are rejected because the items in question are important and part of a suggested list of items of particular concern to public works construction employers, even though not all of the items are enforced by DIR or labor compliance programs.

Comments on Appendix A following section 16421 after April 4, 2008 revisions:

CCMI: 1. CCMI believes the reference to item (10) should not be included. There is prior litigation which challenges this section; it is not truly applicable to the payment of prevailing wages; and it is too confusing to contractors who generally engage in a competitive bid process. 2. CCMI includes in its LCP checklist a notation regarding the use of Electricians on an LCP project. We include the following information because of new DAS requirements requiring Electricians to be certified (or enrolled as Trainees) in order to work on a construction project. Both classifications are considered "journeyman" for purposes of paying prevailing wages, but DAS requires not more than one trainee for each certified electrician employed on a given project. CCMI includes the following language for its checklist:

> "Certification of Electricians: Those employing electricians must comply with employment testing and certification requirements for electricians. Additional information may be required to verify the certification status of those employed."

City of LA: The OCC strongly supports the revision of this section. After reading through the initial proposals, we modified our pre-construction conference checklist to include the legal duty to provide workers with itemized wage stubs. While we have reminded contractors of this obligation for many years, it has never been part of our checklist until now.

Director's Response: CCMI's comment on item (10) is simply a reiteration of comments submitted previously in this and the 2004 rulemaking and does not address why contractors should not be aware that a UCL claim may be based on a violation of prevailing wage laws and that it carries a four year statute of limitations. The Director appreciates CCMI's helpful suggestion on the subject of Electrician Certification requirements but still believes that the lack of an enforcement mechanism that applies to contractors as employers and the continuing duty to pay prevailing wage irrespective of certification status will make the subject too confusing for most LCPs to address at this time. DIR will continue to study this issue as it develops experience with the certification rules.

Comments on section 16422(b):

CCMI: The term "date of the award of the contract" should be more clearly defined [with specific language suggested]. There needs to be a clear definition of award of contract when there is no advertisement or Call for Bids. This needs to apply not only to this section, but also to Section 16000.

CEA: Please clarify if the last sentence, "In the case of a contract for which there is no Call for Bids, the applicable date shall be the date of the award of the contract" only applies to "Applicable Dates for Enforcement of LCPs" or also provides additional definition to CCR 16000, "Date of Notice or Call for Bids".

*Director's Response: The Director did not propose to amend this subsection other than to delete the words "initial or final" before the word "approval." The principal concern of this section is to define when a labor compliance program's authority becomes effective for purposes of (1) making a public works contract subject to the higher prevailing wage exemptions in Labor Code Section 1771.5(a), if it is an approved awarding body program that enforces compliance on all of its public works projects (*see also *regulatory section 16433), or (2) an awarding body's compliance with any statutory requirement to have an approved labor compliance program as a condition for using certain funds or exercising specified contracting authority (*see *section 16423). Conversely, it is not the purpose or intent of this regulation to revise or restate more broadly applicable substantive definitional standards found in section 16000 or any other regulation. Consequently, the suggestions were not accepted.*

Comment on section 16422(g):

ALCP: This detailed procedural provision is an essential and important tool for effective oversight of LCPs.

Director's Response: No response required.

Comments on section 16423(a):

CASH: The proposed regulation suggests that when an awarding body contracts with a third party LCP to initiate, enforce and administer an LCP on its behalf that it "fully contracts out its responsibilities and decision-making authority..." Third party LCP providers are not public entities empowered to award public works projects and are hired by public entities, such as school districts, to serve as a consultant akin to other contracted services such as architectural or construction management. Although a public entity may opt to use a third party LCP provider in lieu of using its own staff to administer its LCP, that public entity fully retains its decision-making authority as an awarding body.
LAUSD: Revise the final exception language following the word "unless" so as to allow a District to retain final decision-making authority. The District is concerned that "fully" contracting out an awarding body's responsibilities and decision making authority would allow a third party's conduct to jeopardize the course of an awarding body's construction projects as well potentially expose its bond funds to risk. These risks could greatly disrupt an awarding body's facilities program and therefore should still be subject to the awarding body's approval. The District suggests the following language for this exception: "..., unless it contracts out its responsibilities and decision-making recommendations to a third party program, which has been approved by the Director pursuant to section 16426, and whose decisions shall be subject only to the final approval of the awarding body or the awarding body's designee."

Parsons: Clarify (1) what projects require labor compliance programs (only those in Appendix B)? (2) Can a District with an approved program monitor some projects in-house or must they perform either or all in-house, and/or contract out all projects? and (3) Must Districts notify DIR prior to bid that they will perform the labor compliance for said project or contract with third party for LCP Services?

Director's Response: CASH's and LAUSD's comments reflect a misunderstanding of the role of private third-party labor compliance programs that was addressed in the 2004 rulemaking, and which the Director has attempted to further clarify in this rulemaking. The purpose and role of labor compliance programs is to enforce state prevailing wage laws, which makes them state enforcement officers and not simply contract administrators. This does not usurp a district's ultimate authority to generally supervise the work of its contract agents. However, the district cannot immerse itself in direct supervision of a contract labor compliance program or maintain the right to compel or veto any enforcement decision by that program unless the district has hired that third party to operate the district's own approved in-house labor compliance program that is subject to DIR's regulatory authority, as specified by Labor Code Section 1771.5(c). This redrafted subsection tries to clarify what it means to contract out labor compliance program responsibilities to an approved third party program (private or public) in lieu of an awarding body obtaining approval to operate its own in-house program. The additional language sought by LAUSD would tend to reinforce the erroneous view that an awarding body may still retain ultimate control over how prevailing wages are enforced even though that awarding body itself has not sought or obtained approval to perform that function.

It is not necessary or appropriate to incorporate the clarifications sought by Parsons in

the regulation. What kinds of projects require labor compliance programs must be determined by reference to the various statutes imposing the requirement, each of which has its own criteria and some of which allow for alternatives in lieu of using an approved labor compliance program. The Director had proposed to list all of these statutes in an appendix following this regulation, but now realizes that the appendix may quickly go out-of-date and thus become a misleading reference. Instead a new subsection (f) has been added to indicate that a current list of such statutes will be maintained on the DIR website. The answer to Parsons' second question is that a district with an approved program can contract with another approved program to monitor some but not all of the district's projects, which is something that has occurred in practice. Finally, when a district must transmit its finding and related notices of how and through whom it intends to enforce labor compliance is already specified in subsection (b) of this regulation.

Comment on section 16423(b):

CASH: Amend as follows:

> "Copies of the finding required by this subpart together with (A) notice of whether or not the Awarding Body intends to initiate and enforce its Labor Compliance Program for all public works projects as required by statute in which the Awarding Body participates…"

Director's Response: The suggestion is inconsistent with the intent of this section and therefore was not accepted. This purpose of this particular notice is to identify whether the awarding body has adopted an "all projects" labor compliance program that would entitle the awarding body to the higher prevailing wage exemptions provided by Labor Code Section 1771.5(a). That statute and regulatory section 16433 require the awarding body to have a labor compliance program for all *public works projects and not simply those for which a labor compliance program is required by statute.*

Comment on section 16423(e):

Parsons: Clarify what it means that the limited exemption from payment of prevailing wage shall not apply unless the awarding body elects to initiate and enforce a Labor Compliance Program for every public works project under the authority of the awarding body – don't they have to operate a labor compliance program anyway?

Director's Response: This language identifies which awarding bodies may enjoy the higher prevailing wage exemptions in Labor Code Section 1771.5(a). Further clarification of the regulatory language appears unnecessary.

Comments on Appendix following section 16423 after April 4, 2008 revisions:

ALCP: This Appendix provides the list of statutorily required LCPs, but the section itself does not reference the Appendix. If the intent is to list programs separately so the regula-

tions do not have to be amended each time a statute adds an LCP requirement, it may be preferable to adopt a regulation which simply states that the Director shall maintain such a list and keep it posted on your web site.

CCMI: The Appendix does not list HUD grants, administered by local agencies, including HOME funding and CBGC grants which require LCPs.

Director's Response: The Director agrees with ALCP's comment and has revised the final text of the proposals as suggested. In light of this revision CCMI's suggestions are moot; however, the Director notes that HUD grant requirements are a matter of federal law and outside the regulatory authority of DIR. The list that was compiled in the proposed Appendix, and that will instead appear on the DIR website, is of statutes that require a labor compliance program pursuant to Labor Code Section 1771.5, meaning a program that has been approved by the Director to enforce the state's prevailing wage requirements.

Comments on section 16425 in general and section 16425(a)(1):

Southwest: LCPs should be required to reestablish compliance with approval criteria yearly.

WCS/Ca: Proof of experience and industry training should be provided to the Director in annual reports.

ALCP President (after close of initial comment period): To show that LCPs remain committed to their work after the new regulations are in place, DIR could reasonably require each approved LCP to produce and submit an amendment to their program and procedures that reflects all of the procedural standards contained in the amendments. This would take a bit of work, but for the LCP that pays attention to its profession is not particularly onerous and logically is essential. It does little good to implement improvements or standards if the program's governing documents are four years out of date.

Director's Response: A new subsection (f) was added, which will require programs to provide updated information on experience and training, legal support, and their manual of policies and procedures following the adoption of these proposals. However, a requirement for annual reviews would be unduly burdensome on programs and DIR alike and has not been shown to be necessary.

Comment on section 16425(a)(7):

Reed (oral): Clarify meaning of "method" as used in this subpart.

Director's Response: This language, which has been in the regulations since 1992, simply requires any applicant for approval as a labor compliance program to state how it will inform the Labor Commissioner of violations that may lead to a contractor's debarment. This requirement has not appeared to confuse applicants, although in practice labor com-

pliance programs rarely notify the Labor Commissioner of potential debarment issues.

Comment on section 16425(b):

CASH: Retain the current 30-day notification by DIR about the approval or denial of an LCP – an extension to 60 days may result in project delays, which is costly to school districts and the state, particularly in a volatile construction bid market.

Director's Response: The 60 day time period provides more time for a full and fair review by the Director before granting approval. The quick and limited reviews conducted in 2003 in order to avoid holding up construction funded by the 2002 school bonds resulted in the approval of many programs that lacked the competence or commitment to enforce labor compliance in the manner required by statute and these regulations. A district should know what funding or contracting authority is subject to an LCP requirement and should be able to establish and seek approval of its labor compliance program far enough in advance to avoid a project delay. A district that cannot do so always has the option of hiring one of the many approved third party programs that operate throughout the state.

Comment on section §16425(c):

CASH: The regulations should clarify the conditions that would cause the Director to grant interim, temporary or restricted approval so that awarding bodies can remedy potential problems before seeking approval of their LCPs. Please recall that CASH has consistently recommended "Approval" without other limits.

Director's Response: Interim or temporary approval is, in effect, a probationary period that would allow a program to gain experience or address potential problems. Conceptually it is no different from initial approval under the current regulations, which is the status that still governs the vast majority of programs. The Director has already placed restrictions on the approvals of some programs to address potential conflicts of interest or limited service capacity. This proposal expressly recognizes that practice while also entitling restricted programs to reasonable conditions for removing the restrictions. Granting unrestricted approval to all programs is unwise as it permits programs to contract for services exceeding their capabilities, and to serve as labor compliance programs in name only for awarding bodies that need to meet a statutory requirement but otherwise are disinterested in prevailing wage enforcement.

Comment on section 16425(f) after April 4, 2008 revisions:

CCMI: CCMI applauds the additions to paragraph (f) relating to extended authority approval of LCP programs.

Director's Response: The Director needs to clarify that the new subsection (f) in this section and the following section 16426 pertains to programs with initial *approval or* ex-

tended initial *approval under the existing regulations, which is the status of most approved labor compliance programs at this time. These programs will have to update the specified items to continue to have approved status. Extended* authority *is a matter that will be handled separately under section 16427.*

Comments on section 16426 in general and section 16426(a)(1):

Southwest: LCPs should be required to reestablish compliance with approval criteria yearly.

WCS/Ca: 1. Experience and training should include proof of attendance at endorsed or sponsored trainings, industry prevailing wage seminars with attendance by all officers with all LCP, at minimum twice yearly. 2. Would like to have included that it is the responsibility of the Director and the Labor Commissioner and related agencies, DLSR and DAS, to conduct a mandatory training for all LCP providers (enforcing officers) and proof of attendance with certification at conclusion that should be submitted to the Director annually.

ALCP President (after close of initial comment period): To show that LCPs remain committed to their work after the new regulations are in place, DIR could reasonably require each approved LCP to produce and submit an amendment to their program and procedures that reflects all of the procedural standards contained in the amendments. This would take a bit of work, but for the LCP that pays attention to its profession is not particularly onerous and logically is essential. It does little good to implement improvements or standards if the program's governing documents are four years out of date.

Director's Response: A new subsection (f) was added, which will require programs to provide updated information on experience and training, legal support, and their manual of policies and procedures following the adoption of these proposals. However, a requirement for annual reviews would be unduly burdensome on programs and DIR alike and has not been shown to be necessary. With regard to WCS/Ca's specific training recommendations, it is not clear what kind of proof would be required, nor is it clear that mandated attendance at two programs annually is a necessary or appropriate solution for maintaining program competence. Such a requirement would involve a substantial commitment of time and resources by programs. The DIR and its constituent divisions also lack the resources at this time to commit to providing annual mandatory training, although we are continuing to explore ways to make more training available.

Comment on section 16426(a)(3)-(5):

Reed (oral): Clarify intent of (a)(3) and why joint labor-management committees are included in (a)(3) but not (a)(4) or (a)(5).

Director's Response: These provisions were adopted in 2004 to address specifically applications for approval as third party labor compliance programs. The principal purpose of the information in (a)(3), which must be updated in annual reports, is to inform DIR and

the public of relationships that may be a source of conflicts of interest. The terms "contractor, subcontractor, surety, or worker representative," as used in (a)(4) and (a)(5), is a shorter form of reference intended to embrace all categories of persons and entities referred to in (a)(3) without restating each of the items verbatim. In prevailing wage enforcement cases, a joint labor-management committee typically acts as a "worker representative" and thus is embraced in that term.

Comment on section 16426(a)(7):

Reed (oral): Clarify meaning of "method" as used in this subpart.

Director's Response: This language, which has been in the regulations since 1992, simply requires any applicant for approval as a labor compliance program to state how it will inform the Labor Commissioner of violations that may lead to a contractor's debarment. This requirement has not appeared to confuse applicants, although in practice labor compliance programs rarely notify the Labor Commissioner of potential debarment issues.

Comment on section 16426(a)(8):

Reed (oral): Clarify whether "awareness" as used in this subpart requires a written statement or just being aware.

Director's Response: Since applications for approval are made in writing, the awareness of rights and responsibilities must be expressed that way. Given the demonstrated lack of awareness of FPPC reporting requirements in practice as well as the concerns expressed by one commenter about information handling, DIR may ask to see specific written policies that a program has adopted to cover these subjects.

Comments on section 16426(a)(9):

CASH: Strike this subsection. [*Note:* CASH's actual suggestion is to strike subsection (a)(3), but its supporting rationale clearly pertains to subsection (a)(9).] Under current law, school district board of education members, superintendents, and senior administrators are required to file Statements of Economic Interest with the FPPC. The board of education is the sole body with the legal authority to enter into contracts for construction of capital projects or for contracts for services such as providing assistance for the operation of LCPs. Any contract for LCP services by an individual providing assistance to the operation of a district-operated LCP, or a contract with a company that has its own LCP approved by DIR for operation in one or more districts, is approved exclusively by the local board of education whose members must file Statements of Economic Interest with the FPPC. The requirements in Section 16426 and 16430 are unnecessary as employees or contractors involved in LCP services have no legal authority to enter into such contracts. Employees may be reassigned and consultants under contract to boards of education may be discontinued at the discretion of the district under terms and conditions that the boards include in such contracts upon conclusion of contract negotiations.

Parsons: Clarify who within firm would be required to meet FPPC reporting requirements.

Director's Response: CASH's comments reflect a limited understanding of who has reporting responsibilities under the Political Reform Act. The authority to enter into a contract is just one kind of governmental decision. Another kind of governmental decision is whether to enforce a law (2 Cal.Code Reg. §18701(a)(2)(A)2.); and persons who participate in making governmental decisions include senior staff who conduct investigations requiring the exercise of judgment and make recommendations to the decisionmaker. (2 Cal. Code Reg. §18702.2) As was observed in the 2004 rulemaking and confirmed in an FPPC opinion letter cited in that rulemaking and this one, an outside consultant who performs these functions pursuant to a contract with local government is included within the definition of public officials with reporting responsibilities. (2 Cal.Code Reg. §18701(a)(2).) The FPPC regulations cited in this proposed subsection define more specifically who has reporting responsibilities. Third party labor compliance programs need to familiarize themselves with those separate regulatory requirements (with the assistance of legal counsel if necessary) and then determine who will participate in making governmental decisions on whether to enforce prevailing wage laws on behalf of the awarding bodies with whom the program will contract. Precisely who must be included depends on the specific duties and authority employees have within a particular program, but should include anyone with authority and responsibility similar to a deputy labor commissioner employed by the Division of Labor Standards Enforcement (all of whom must file statements of economic interest under the DIR's conflict of interest code at 8 Cal.Code Reg. §17000) and anyone at a higher level of authority in the program.

Comment on section 16426(b):

CASH: Retain the current 30-day notification by DIR about the approval or denial of an LCP – an extension to 60 days may result in project delays, which is costly to school districts and the state, particularly in a volatile construction bid market.

Director's Response: The 60 day time period provides more time for a full and fair review by the Director before granting approval. The quick and limited reviews conducted in 2003 in order to avoid holding up construction funded by the 2002 school bonds resulted in the approval of many programs that lacked the competence or commitment to enforce labor compliance in the manner required by statute and these regulations. A district should know what funding or contracting authority is subject to an LCP requirement, and it should not depend on being able to contract for labor compliance services with a program that is not yet approved and may not be approved. There are many other approved third party programs operating throughout the state.

Comments on section 16427 in general and section 16427(a):

ALCP: Fully agree with the general scheme and content of Section 16427.

Parsons: Clarify how "extended authority" will be granted. Does the previous three years of experience administering a third party program meet the qualifications? (*Note:* Parsons designates this as a comment on section 16426, but the substance of the comment clearly pertains to section 16427.)

Best Best: The previous regulations reflected a bifurcated approach to labor compliance programs in which there was "initial" approval and then "final" approval. The Proposed Regulations delete this distinction and provide that after three (3) years of operating a Labor Compliance Program ("LCP") "extended approval" may be granted. We note several areas in the Proposed Regulations in which remnants of the previous regulatory distinction remain. For instance, Section 16427(a) of the Proposed Regulations utilizes the term "initial approval."

WCS/Ca: WCS fully supports the "extended approval" to those programs fully qualified. However, LCP has duty to fully demonstrate its understanding and ability to monitor and enforce through …

Director's Response: No response is required for ALCP's comment. With regard to Parsons' comment, the proposal makes a few specific revisions to the existing regulatory language which has governed final approvals since 1992 and appears to be understandable and not in need of further clarification. Under this language, a program must have had "active" enforcement responsibilities for three "consecutive" years to meet the experience requirement. In other words, it is not enough to have had approved status for at least three years if the program has not been doing labor compliance enforcement work throughout that time period.

With regard to Best Best's comments, retention of the word "initial" in subsection (a) was intentional, since its purpose there is to provide a time-based frame of reference for when a program may apply for extended approval, though the word will no longer denote a specific regulatory status. The Option B version of the proposed amendment to section 16431(a), included the words "final approval or extended authority" to allow for the possibility that this section 16427 would not be amended, but the words "final approval or" were subsequently deleted. The Director is not aware of any other instances in which the old terminology was not revised to reflect the changes proposed in this section. WCS/Ca's suggestion to change the program's burden of persuasion from "satisfactorily" to "fully" demonstrate was not accepted. There is no showing what difference this proposed change in terminology would make, and there is no recent track record through which to measure the effects, since no final approvals have been granted in the past several years.

Comment on section 16427(d):

CEA: Delete this subsection. In its present state, "an agreement ... for different procedures" is vague, prevents a regulatory evaluation and distracts from a uniform procedure.

Director's Response: The recommendation was not accepted. The option conferred by

this subsection has been in the regulations since 1992 and currently applies to fewer than a dozen programs. While more uniformity may be desirable, there is no showing that this option has caused any problems in practice for contractors or others. Programs like Caltrans that have statewide responsibilities and other laws to enforce may need alternative procedures to meet their responsibilities in the most efficient manner. Any such agreement to use alternative procedures is available to the public, thus protecting the public's interest in knowing what procedures apply.

Comments on section 16428 in general:

Caltrans: Caltrans has concerns regarding subpart (e) which provides that the Director "shall make all final determinations" but does not indicate whether there is an appeal process for LCPs whose programs are revoked. There should be an appeals process, particularly with regard to the fact that no hearing is required under subpart (a). If there is no appeals process, the LCP has no opportunity to be heard and to present facts in rebuttal of the request for revocation.

LAUSD: In a prior round of comments, the District requested that a due process hearing be mandatory prior to approval of any request for revocation. The Director expressed his view that hearings should not be mandated when revocation of an LCP is a matter of housekeeping, such as an insolvent or abandoned LCP, or a felony conviction for criminal conduct in the operation of the program. In consideration of this concern, the District requests that a revocation hearing be required if the LCP disputes the revocation action.

*Director's Response: The Director recognizes that approved labor compliance programs have a due process right to notice and an opportunity to be heard when faced with the proposed revocation of their approval, as recognized in subsection (a). The nature and extent of that right may vary according to the nature of a program's approval and the grounds for revocation. (*See Mathews v. Eldridge (1976) 424 U.S. 319, 333-4 *[due process is the opportunity to be heard at a meaningful time and in a meaningful manner, and is flexible, calling for such procedural protections as the particular situation demands]). The Director has now revoked or terminated the approval status of several labor compliance programs without denying any program the right to challenge that action or an opportunity to be heard if requested. However, the Director has faced the opposite problem of unwarranted due process claims made by programs seeking to forestall revocation (including a claimed fundamental vested interest in being an approved program in one case and a request for a full evidentiary hearing on essentially undisputed facts in another). For these reasons, the Director does not want to change the regulatory language further at this time, but will continue to study this issue and may propose future revisions after gaining more experience with the revocation process.*

Comment on section 16428(b)(3):

LAUSD: Add a second sentence stating that if the Director determines that an interested party has failed to submit sufficient evidence to support revocation of an LCP, the Director

may deny the request without a hearing. This would clarify the Director's authority to streamline the process if an interested party fails to make a prima facie showing of grounds for revocation.

Director's Response: Such an amendment is unnecessary. The authority to deny a request for revocation without a hearing and a corresponding duty to give notice and the reasons for that decision to the interested parties, is already set forth in subsection (c).

Comment on section 16428(f):

LAUSD: Amend this section to require a hearing before the Director may impose conditions or restrictions on an LCP's right to operate. DIR should also identify written standards or criteria by which the Director can decide to restrict or condition the right of an LCP to operate. An awarding body's state bond funding for its public works projects would be at risk by such an act. Because of the extraordinary detriment to awarding bodies from an adverse decision, such decisions should not be entirely discretionary.

Director's Response: See the Director's Response to comments on section 16428 immediately above with respect to hearing rights and the Director's Response to the comment on section 16425(c) further above with respect to placing conditions or restrictions on a program's approval. The basis for LAUSD's contention that such restrictions may jeopardize state bond funding is unknown. The Director has never revoked or imposed restrictions on the approval of a program arbitrarily or without prior notice, and the Director has never asserted any authority to revoke approval retroactively. An awarding body whose labor compliance program (in-house or contract) is in jeopardy of being revoked always has the option of contracting with another approved program in order to remain in compliance with any statutory mandate to have an LCP.

Comment on section 16429:

LAUSD: The District requests that DIR amend this provision to state that notice of LCP approval could be posted at the job site or on the awarding body's website. The District has over 1,000 job sites at any given time, and such a modification would relieve a burden on the District and its contractors.

Director's Response: This suggestion was not accepted, as it would defeat the purpose of job site posting, which is to give notice to workers at the job site that a labor compliance program is enforcing prevailing wage requirements at that particular project. This requirement is no more burdensome than the job site posting requirements imposed by other laws, such as Labor Code Section 3550's requirement to post specified workers' compensation information.

Comments on section 16430 in general:

Caltrans: Caltrans already complies with the requirements of this section and supports this

change.

CASH: Strike this section. Under current law, school district board of education members, superintendents, and senior administrators are required to file Statements of Economic Interest with the FPPC. The board of education is the sole body with the legal authority to enter into contracts for construction of capital projects or for contracts for services such as providing assistance for the operation of LCPs. Any contract for LCP services by an individual providing assistance to the operation of a district-operated LCP, or a contract with a company that has its own LCP approved by DIR for operation in one or more districts, is approved exclusively by the local board of education whose members must file Statements of Economic Interest with the FPPC. The requirements in Section 16426 and 16430 are unnecessary, as employees or contractors involved in LCP services have no legal authority to enter into such contracts. Employees may be reassigned and consultants under contract to boards of education may be discontinued at the discretion of the district under terms and conditions that the boards include in such contracts upon conclusion of contract negotiations.

Parsons: Clarify if all staff, including field staff, must file.

Director's Response: No response is required for Caltrans' comment. See the Director's Response to comments on section 16426(a)(9), which fully addresses the same comments made by CASH and Parsons with respect to that section. In summary, labor compliance program personnel who participate in making governmental decisions, either as employees or consultants of awarding bodies, have reporting responsibilities under the Political Reform Act and the Fair Political Practices Commission regulations cited in this proposed regulation. The governmental decision-making in which labor compliance program personnel participate is the enforcement of state prevailing laws rather than entering into contracts. This was confirmed by an FPPC Opinion letter cited in the 2004 rulemaking and this one.

Comment on section 16430(b):

CCMI: CCMI objects to the filing a FPPC Form 700 with EACH Awarding Body. It should be sufficient for an approved LCP to file a single FPPC Form 700 with the DIR covering all jurisdictions with which it contracts. The form should be filed in conjunction with the LCP's annual report submission with the DIR.

Director's Response: Filing requirements are determined by the Political Reform Act and individual filing agencies, and not by the DIR. Nevertheless, the Political Reform Act and the Fair Political Practices Commission allow for alternative filing locations for multiple jurisdiction filers. The Director proposed language in this section that would allow for DIR to be designated as an alternate filing location for labor compliance programs that serve more than one awarding body, and DIR will work with the Fair Political Practices Commission to obtain that designation. Filing deadlines are also determined by the Political Reform Act and FPPC regulations, but the Director is not aware of any authority to

change those deadlines for labor compliance programs.

Comment on section 16430 after April 4, 2008 revisions:

CCMI: CCMI objects to the requirement of the filing of FPPC Form 700 as currently stated in the regulations. Does this mean every employee of CCMI or just officers or major shareholders? CCMI also objects to having to file an FPPC Form 700 with EACH Awarding Body. CCMI performs work for nearly 50 different public entities throughout the State. With none of our employees being elected officials, such a requirement would be unduly burdensome for CCMI. While we believe it is important to identify and address potential conflict of interest issues involving LCPs, it is also important to create a balance between information and repetitive, burdensome paperwork. CCMI proposes that a single FPPC Form 700 be required to be filed with the FPPC and the DIR for any employee (or owner) of a third party who is also employed (part or full time) by a public agency or elected to serve on a public agency board.

Director's Response: The Director did not revise this proposal following the initial comment period, and this comment reiterates prior objections, suggestions, and clarifications that have been responded to immediately above. To further clarify some additional points raised here, Political Reform Act and FPPC reporting requirements are not limited to elected *officials and clearly embrace labor compliance program personnel who participate in making enforcement decisions on behalf of awarding bodies served by the program. The Director has no authority to change Political Reform Act requirements to make them less onerous for labor compliance programs or for any other reason, although the Director will seek to establish a single filing location for multi-jurisdiction programs. The principal purpose of this and related regulations is to make programs aware of their duty to comply with applicable Political Reform Act and FPPC requirements, given the continuing widespread lack of awareness and misunderstanding of those requirements.*

Comments on section 16431 in general:

Caltrans: Caltrans strongly supports the adoption of Option A because it offers a much more "user friendly" alternative and sets forth processes that will provide DIR with necessary tracking information without placing an unreasonable burden on LCPs. Of particular interest to Caltrans, it is helpful that this section provides a mechanism for reporting what we refer to as "Restitution at District Level (RDL)." The vast majority of violations are handled at the field level when the contractor agrees to make restitution rather than at hearing. We assume this is true of most other LCPs. Option B requires the use of a specific form not currently used by Caltrans and allows for use of a different form if agreed to by the Director. [Extensive commentary provided on Caltrans' reporting history, the extent of its labor compliance enforcement work, and why use of the mandated forms would be burdensome.] If Option B is adopted, Caltrans asserts its status as having "extended authority" as defined in Section 16427 and seeks to continue using its current and longstanding report format with the idea that Caltrans will provide information regarding a specific vi-

olation at DIR's request.

Keenan: In our view, a number of the proposed changes (e.g. both options for the annual report requirements of 16431) still continue to emphasize that the success of an LCP should be judged by the number of penalties, forfeitures and Labor Code 1742 and 1777.1 cases.

ALCP: Our membership strongly encourages the Department to use Option "B".

CASH: C.A.S.H. prefers the clarity and consistency in the reporting mechanisms provided by Option B; however, we would request that the reporting forms that are available on the DIR website be editable so that districts can complete and return them electronically.

City of LA: The Office of Contract Compliance (OCC) sees the need for – and strongly supports – the proposed amendments to Section 16431. The OCC finds either of the two options to be viable, and has no preference as to which option is adopted.

LAUSD: The District prefers the implementation of Option A over Option B.

Reed: My recommendation is for Option B which will provide a consistent format for all Programs which eliminates any discretion as to content by the LCP, while standardizing and limiting the forms which the department must review. [This commenter also identified a typographical error in the designation of one of the report forms at the end of Option B.]

SCC: SCC feels that either of these options could fulfill the requirement for annual reporting; however, please consider the following: While Option A provides seemingly more flexibility for LCPs to compose the annual reports; Option B has the advantage of allowing the Director by review to gauge the enforcement quality of each LCP. In our opinion, this is a much needed aspect of the program and would be a welcomed check and balance to help standardize a quality of service that is ostensibly not similar among all third-party administrators. Both options seem comparable.

SBCTC (oral) and Ravnik (oral): Support Option B.

Director's Response: In response to these comments the Director chose Option B, which varied from Option A principally in its requirement that programs use the same reporting format rather than allowing for use of the forms on an optional basis. The forms were developed to provide more meaningful and consistent information for DIR, the legislature, and others who must evaluate the effectiveness of labor compliance programs. Caltrans and LAUSD, the two commenters who prefer Option A, retain the option to use different reporting formats by agreement with the Director based on their status as programs with final approval under the current regulations and extended authority under these proposals. The Director disagrees with Keenan's comment about the forms overemphasizing wage and penalty recoveries for reasons set forth in the Director's Responses to Keenan's comments about the regulations in general above. Finally, the sentence with the typographical

error identified by Reed was removed.

Comments on section 16431(a) and (d):

CCMI: CCMI objects to having to file a separate report for each and every public entity with which it contracted. Currently CCMI files one report, but breaks out in the report each awarding agency, each project, and the respective 1771.5 enforcement activity. We would like to continue to report our activity in this way.

Parsons: One of biggest issues has been Annual Report due dates and who submits what. Since we monitor several Districts' LCP Programs, there are some Districts we use our own approved LCP Program for and those we use the Districts approved LCP Program for. (What date constitutes due date for the report, ours or theirs, and how do we clarify to DIR clearly this information?) Our Districts are notified over and over they did not submit an Annual Report when in fact we submitted one under our report for them.

Director's Response: The language of the proposal and the relevant form require that the information be separately reported and not that there be separate reports for each awarding body. CCMI's stated practice is consistent with this requirement. However, each approved program is required to file its own report, and a third party program that has been hired as staff for an approved awarding body program operating under its own authority may be responsible for filing a separate report for that awarding body program for the reporting period that applies to the awarding body's program under subsection (d). The Director understands that this causes some confusion and the potential for double-reporting, and DIR will be looking into this matter further to address such concerns.

Comment on section 16431 after April 4, 2008 revisions:

City of LA: The OCC sees the need for and strongly supports the proposed amendments to this section. These amendments will facilitate swift compilation and uniformity of data, thereby allowing DIR to be more productive through better monitoring and evaluation of the performance of the various LCPs.

Director's Response: No response required.

Comments on section 16432 in general:

Caltrans: Caltrans supports adoption of Option A because it offers defined procedures for reviewing certified payroll records and conducting audits and investigations. Option B includes requirements with which Caltrans could not comply with current staffing levels. For example, subpart (b) requires that all payroll records be reviewed by LCPs within 30 days after receipt. Because Caltrans receives thousands of certified payrolls in a 30-day period, it would be impossible to review all payrolls with existing staffing levels.

WCS/Ca: WCS endorses Option B, which is more thorough.

ALCP: Our membership strongly encourages the Department to use "Option B" as the basic armature for Section 16432. ALCP has consistently supported vigorous but reasonable and transparent procedures for the conduct of investigations and any subsequent enforcement actions. We find the provisions of subitems (e) and (f), within Option B, to be supportive of that position.

CCMI: CCMI disagrees with the random quarterly audit provisions in Option A, which would be counterproductive to the Governor's statement that LCPs are not cost effective.

CSU: In evaluating the two proposed Options for Section 16432, Option A is preferred by CSU. This preference stems from budgetary constraints not necessarily faced by school districts. Unlike school districts, CSU does not receive a supplemental grant for labor compliance monitoring. Consequently, all funds required to enforce monitoring efforts are directly taken away from its facilities programs. Based on these considerations, the more moderate requirements under Option A alleviate significant financial burdens on an already budget conscious entity.

CASH: C.A.S.H. prefers the clarity and consistency provided in Option B as it defines review, audit and confirmation, an issue we raised last October.

City of LA: Although both options perform the much needed service of codifying some basic labor compliance procedures, we prefer the proposed Option A for the revision to Section 16432. This position is based on our belief that Option A presents a much more realistic option for monitoring and review of certified payrolls and prevailing wage projects in general than does Option B.

Parsons: Preference would be Option B.

Reed: My strong recommendation is for Option B. This option provides much more structure and accountability; whereas Option A provides limited involvement for review and no requirement to do field interviews. I suspect most for-profit LCPs would side with Option A since it could reduce their work load. Most for profit LCPs will tell you that field interviews return few results. I have hard documented facts to negate that idea.

LAUSD: Both Option A and Option B impose burdensome requirements upon the District's Labor Compliance Program ("LCP"). The District operates an approximately $19.3 billion construction and modernization program, and its LCP faces the unique challenge of enforcing prevailing wage laws on an extremely great scale, i.e., on thousands of public works projects. If the DIR intends to require inspection of all payroll records as stated in §16432 Option A and Option B, then the District requests that the DIR grant the District an exemption from the requirements because mandatory inspection of all payroll records would be unfeasible for the District's LCP. The District prefers the implementation of Option A over Option B.

WECA: WECA-IEC does not express a preference for option A or option B as drafted.

SBCTC (oral) and Ravnik (oral): Support Option B.

Director's Response: Option B was chosen as the more appropriate vehicle for amending this section because its performance standards are more specific, more likely to result in prompt and proactive monitoring and enforcement that should reduce prevailing wage violations, more closely resemble the current practices of the Division of Labor Standards Enforcement and competent existing labor compliance programs, and more responsive to the concerns of the Legislative Analyst's Office about inefficient and ineffective enforcement by labor compliance programs. Conversely, the Option A standards were regarded as too lenient and potentially making it easier for dishonest contractors to evade enforcement. A weekly onsite monitoring requirement was retained as the most appropriate minimum standard, given the fact many subcontractors may be on site for a week or less. Caltrans acknowledged at the public hearing that its current practice is to review all certified payroll records in thirty days, consistent with the proposed standard. The concerns of Caltrans, City of LA, and LAUSD about the burdensomeness of Option B appear to have been based in large part on a misunderstanding about the extent of record review and monitoring required. Subsection (c) on "Confirmation" of payroll records was revised further to clarify that it requires random rather than blanket review, and misunderstandings over the burdensomeness of site visits is addressed in the response to comments on subsection 16432(d) below.

Comments on section 16432 in general after April 4, 2008 revisions:

City of LA: The OCC originally preferred Option A based on our belief that it presented a more realistic option for monitoring and review of certified payrolls and prevailing wage projects in general. We are currently monitoring approximately 580 projects of varying sizes. Attempting to monitor a project load of this magnitude with on-site visits conducted each week workers are present at the site will be very difficult. Nonetheless, we recognize the necessity of conducting "on-site visits" and shall do our best to meet this requirement.

LAUSD: Option A of Section 16432 outlines common practices of the District in enforcing labor compliance. Due to the complexity and scale of our construction program, it would be most efficient for both the District and affected contractors to continue exercising Option A. The District strongly opposes the deletion of Option A concerning Payroll Record Review, Investigations and Audits. Option A reflects a cooperative approach which fosters compliance with contractors. The ensuing result of this approach is a long-term solution to delinquency amongst contractors as they become conditioned to the established LCP guidelines in an environment that encourages meaningful discourse. The requirements dictated in Option B Subsection (b) and (c), regarding the review and confirmation of payroll records puts little faith in contractors' ability to follow regulations without constant surveillance by LCPs. This is a short sighted approach that not only burdens LCPs but also discourages contractors from working on prevailing wage contracts that they

will view as costly. It will necessitate additional manpower to ensure fulfillment of the additional requirements. This in turn will result in an escalation of construction costs not only to contractors but to awarding bodies themselves.
Director's Response: The Director's reasons for selecting Option B are set forth in response to the initial general comments on this section, immediately above. The Director recognizes that LAUSD has an older established labor compliance program with a record of active enforcement that undoubtedly contributes to its ability to gain compliance in a cooperative environment. Unfortunately it is the vast majority of programs that have come into existence in the past five years – which the Legislative Analyst's Office found to be expensive and ineffective – that generated the need for the guidelines and standards specified in Option B. The Director does not advocate a punitive or non-cooperative approach toward contractors. However, labor compliance programs need to recognize that they have a duty to honest contractors, as well as to workers, to identify and rectify substandard pay practices so that dishonest contractors do not gain a competitive advantage through the ability to underbid on public works projects where there is no fear of enforcement. The Director has sufficient information through comments on these proposals, that the Option B standards are consistent with the existing practice of many programs and consequently are neither unnecessary nor unduly burdensome. Nevertheless, if the overall enforcement atmosphere changes and any of these standards proves to be unnecessary or unduly burdensome in practice, DIR can revisit them again in a future rulemaking.

Comments on specific provisions of Option A proposals for section 16432:

Comments on specific provisions of Option A were offered by Caltrans, Keenan, ALCP, LCPTracker, CCMI, CSU, CEA, LAUSD, WECA, and SCC.

Director's Response: Because Option A was not adopted, it is not necessary to address comments on specific aspects of Option A. All subsequent comments and responses on section 16432 pertain to Option B.

Comments on section 16432(b) [Review of Payroll Records]:

Southwest: DIR should require specific processing procedures that control certified payroll processing, storage and destruction by all LCPs. These procedures should be in compliance with the Fair Information Practice Principles recommended in the California Summary of Civil Code Sections 1798.85-1798.86. The LCP should be able to produce written and approved procedures detailing how they handle the personal information of others, and those procedures should be in accordance with DIR established requirements. DIR should be able to produce audit results proving that their approved LCP is in compliance with DIR approved procedures.

Caltrans: Subpart (b) requires that all payroll records be reviewed by LCPs within 30 days after receipt. Because Caltrans receives thousands of certified payrolls in a 30-day period, it would be impossible to review all payrolls with existing staffing levels. More troublesome is the requirement in subpart (b)(3), where the LCP must make "confirmation of

payment in the manner and to the extent described in (c)" apparently as part of the payroll records review process.

Keenan: The 30-day timeline will be too long in most cases to implement timely and effective corrective measures before having to involve DIR, thereby adding to their administrative workload. The first payroll record received should be inspected within 24 hours, which is one of the LCP services we contractually commit to with our clients.

WCS/Ca: We suggest adding the following language to the second sentence [added words underlined]: "'Review" for this purpose shall be defined as careful examination, comparison and calculations as part of the inspection of the payroll records ..."

ALCP: We strongly suggest the addition of an item (4) to the text of sub-item (b), specifically, "(4) that the worker classifications listed within the payroll records are appropriate for the work completed during the period represented by those payroll records." Also recommend adding the words "shall be collected at least monthly and" before the words "shall be reviewed by the Labor Compliance Program as promptly as practicable . . ." Subsection (b) deals properly with the promptness with which submitted payroll records will be reviewed and the rudiments of what a review will consist of. Combined with Section 16421(a)(3), which establishes a minimum requirement to collect CPRs on a monthly basis, this should do the job. Lack of a proper standard for something as basic as collection of CPRs and articulation of the minimum level of review that is applied to those CPRs has been a "green light" to such LCPs to do nothing, justified by the discretion that they felt was granted to them to determine the frequency and need for review. The two components; a requirement to collect all CPRs on some minimum interval and a requirement to actually do something with them when they come in must be inexorably joined. Experience in the field clearly indicates that a minimum CPR collection interval of once-per-month is the standard that should be in place.

LCPTracker (written and oral): This language appears to call for monthly submission of payroll records. Payrolls should be submitted and checked weekly CPRs should be submitted and reviewed weekly, which is more cost-effective for contractors and more productive for administrators. A weekly submittal would insure that errors were caught in a more timely fashion and that workers are receiving the correct wages.

CCMI: CCMI agrees with this provision.

LAUSD: "Payroll Records" as defined under 8 California Code of Regulations §16000 includes all backup documents. It does not appear to have been DIR's intent to require inspection of all backup documents. Therefore, we suggest that "certified payroll records" would be an appropriate term. Requiring inspection of all payroll records of all contractors and subcontractors within 30 after receipt would be extraordinarily oppressive and burdensome for the District's LCP. The District also requests the following language to be added to the end: "Inspection may be undertaken either manually or electronically through a system that has been approved by the Labor Commissioner. Inspection through an approved

electronic system is considered compliance under this section." Because the number of CPRs the District receives is voluminous, requiring the manual inspection of each CPR within 30 days after receipt would be onerous and demand an enormous portion of the LCP's time. Additionally, the language of this subsection appears to require confirmation of payment under subsection (c) within 30 days, while the language of subsection (c) requires confirmation randomly or as deemed necessary. The District recommends further clarification of these provisions which are confusing and appear to conflict.

SCC: Inspection should be consistent with reporting intervals to accurately ensure compliance with all aspects including the payment of the appropriate prevailing wages, apprenticeship registration, trade ratios, apprentice ratios, fringe trust verification, presence of all data, etc. Weekly review of certified payroll records should be the minimum standard unless a contractor demonstrates a high level of compliance, such that no violations other than minor inadequate information violations are apparent and do not affect the opportunity to audit.

Director's Response: No substantive changes were made to this subsection as first proposed. For reasons discussed in response to the comments on section 16421(a)(3) above, a requirement for weekly submission of certified payroll records is considered unnecessary. Southwest's comments regarding processing and handling of certified payroll records are addressed above in response to Southwest's uncategorized comment on information practices above. The additional language suggested by WCS/Ca and LAUSD adds unnecessary detail. ALCP's suggestion to add language requiring records to be "collected … monthly" is redundant to the reference to "records furnished by contractors in accordance with section 16421(a)(3)" within the same sentence. ALCP's proposed addition of a subpart (b)(4) on worker classification listings could provide helpful guidance in the abstract. However, conceptually the process of comparing reported classifications with information about work completed on the project during the payroll period is part of the "confirmation" process described in subsection (c). The review process described in this subsection (b) involves inspecting certified payroll records to determine if they are complete and accurate on their face, and is a process required for every certified payroll record. Using additional information to corroborate what is reported on a certified payroll record, including making a comparison between reported classifications and what work was known to have been completed on the project is part of the "confirmation" process described in subsection (c), which need only be undertaken randomly, as specified in subsection (c) or when the program has reason to suspect that reported information may be inaccurate. Finally, the concerns expressed by Caltrans and LAUSD over the interplay and potential conflict between the language of subpart (b)(3) and subsection (c) were addressed by amending the language of subsection (c), as discussed below.

Comment on section 16432(b) after April 4, 2008 revisions:

ALCP: Reiterated suggestion to add a subpart (b)(4) to require that payroll records also be reviewed to determine if "worker classifications listed within the payroll records are appropriate for the work completed during the period represented by those payroll records."

Director's Response: This suggestion was not accepted for the reasons discussed in the response to the initial comments on this subsection immediately above.

Comments on section 16432(c) [Confirmation of Payroll Records]:

Caltrans: 1. Caltrans cannot comply with "confirmation" of certified payrolls without obtaining additional staff and operating expense funds through the budget change proposal process. Due to the number of payrolls received, Caltrans would have to pass on the burden of supplying copies of paychecks or paycheck stubs to its contractors on a monthly basis. This would result in additional payroll administrative costs for contractors. Direct confirmation of payments from third party recipients will be difficult to accomplish as third party trusts are not willing to supply data to an outside entity on a regular basis due to concerns over confidentiality. For this reason, Caltrans seeks confirmation of fringe benefit payments from contractors by cancelled checks and trust fund statements. This method provides confirmation of payment and should be allowed rather than seeking information from an unwilling third party trust. "Confirmation . . . undertaken randomly or as deemed necessary by the Labor Compliance Program, and . . . whenever complaints . . . or other circumstances or information reasonably suggest . . . that payroll records furnished by contractors are inadequate" is the current Caltrans practice. Caltrans suggests adding a provision that LCPs with either extended authority or contracting dollars in excess of $1 billion may apply the language as written above and without the monthly confirmation requirement as written in the final sentence of subsection (c).

Caltrans (oral): We do inspect all of our certified payrolls. However, required confirmation of every payroll would be difficult. We require payrolls to be submitted by the 15th of the month for the previous month's work. Our Labor Compliance Office takes those certified payrolls, matches them with the inspection reports, looks at the interviews that are submitted, matches all the information up, and on a thirty-day cycle inspects these certified payrolls and writes letters to contractors informing them of any violations.

ALCP: This subsection is highly endorsed by our membership; however, one issue must be noted. While this item properly cites the need to use corroborating documents such as copies of paychecks or stubs and direct confirmation of payments from third party recipients of "Employer Payments" and even further cites the more extensive listing of supporting documents by reference to 8 C.C.R. Section 16000, we are still left with the ambiguous stalemate that has long surrounded the enforcement of rendering such records to the LCP. If Labor Code Section 1776 penalties cannot be assessed for failure or refusal to provide the supporting documentation, the requirement to employ such documentation for "confirmation" purposes will remain an empty mandate.

CEA: Amend as follows:

> "Confirmation" of payroll records furnished by contractors and subcontrctors shall be defined as an independent corroboration of reported prevailing wage payments. Confirmation may be accomplished through worker interviews, examination of pay-

checks or paycheck stubs, direct confirmation of payments from third party recipients of "Employer Payments" (as defined at 8 C.C.R. section 16000), or any other reasonable method of corroboration. Confirmation of payroll records ~~furnished may be undertaken randomly or as deemed necessary by the Labor Compliance Program, and~~ shall be undertaken whenever complaints from workers or other interested persons or other circumstances or information reasonably suggest to the Labor Compliance Program that payroll records furnished by contractors are inaccurate. ~~Confirmation of furnished payroll records shall be undertaken for each contractor during each month that each contractor's workers are listed as having been employed in the execution of the contract for public work.~~"

The LCP's review of certified payroll records, job site inspections and a comparison between certified payroll records and jobsite daily reports is generally sufficient to compliance. Confirmation should take place when there is reason to believe that a contractor or subcontractor has violated the law based on the factors listed above. Contractors and subcontractors who have demonstrated compliance by properly submitting certified payroll records that agree with the Director's wage determinations and the amount and type of work performed, should not be burdened with random and unreasonable confirmation demands.

LAUSD: The language in subsections (b) and (c) is confusing and implies that the LCP must confirm the payment for all payroll records each month work is performed on our projects. The District also requests the following language to satisfy the requirement of Subsection (c). "Confirmation may be undertaken either manually or electronically through a system that has been approved by the Labor Commissioner. Confirmation through an approved electronic system is considered compliance under this section."

Solis (oral): Inspector reports, sign-in sheets, payroll registers and on site visits to the contractor's office are important sources of information to support information provided in certified payrolls.

Director's Response: The language of this subsection was redrafted to address the concern that it could be interpreted as requiring confirmation of every payroll record. CEA's other amendments were not accepted because they would require a complaint or other outside information that may not come to light until much later, before a program could test the accuracy of certified payroll records through confirmation. The expectation of random confirmation is a disincentive to any contractor who might falsify its records to cover up violations. The additional language suggested by LAUSD was not accepted, as it does not appear suitable to the process of confirmation. The Director further notes that the second sentence of this subsection uses the word "may" rather than "shall" prior to listing various means through which to accomplish confirmation; consequently there is no mandate to use any particular method that does not produce useful information.

Comment on section 16432(c) after April 4, 2008 revisions:

LAUSD: The review and confirmation process diminishes the gravity of an audit from the contractor's perspective. By constantly requesting payroll records, contractors become jaded to their obligations – which they will come to view as a burden rather than an effort to prevent serious violations from occurring.
CCMI: CCMI agrees with the change from "may" to "shall" for the purpose of reviewing certified payrolls. However CCMI believes that a random audit of one worker for one week in a month is insufficient to capture prevailing wage violations. Instead, CCMI proposes the following:

> "The LCP shall audit certified payrolls for the first 30 days any contractor or subcontractor performs work on the project. If there are no outstanding wages or other LCP violations, then the LCP may randomly audit the certified payroll for each contractor/subcontractor for a minimum of one week each month. Once a contractor/subcontractor who has previously had an LCP violation has submitted payrolls with no LCP violations for a period of one month (excluding non performance statements), then the LCP may elect to randomly audit this contractor/subcontractor once a month. Whenever a random audit demonstrates that a wage violation or other LCP violation has occurred, the LCP shall retroactively audit all certified payroll for that particular contractor/subcontractor."

Director's Response: The basis for LAUSD's comment is unknown and seems counterintuitive, unless LAUSD is referring to a constant flow of back-up documentations, which is not contemplated by this regulation. Otherwise, as with tax returns or payment invoices, the natural assumption behind a legal requirement to prepare and furnish certified payroll records is that someone actually will look at those records and may from time to time audit or cross-check those records against other information ("confirmation" under this proposal) to verify their accuracy. CCMI's suggestion to further modify the language of this subsection was not accepted. One problem with the suggested language was its use of the term "audit" in a manner that appears to be different from how that term will be defined under proposed subsection (e) of this section. In addition, the Director believes that a random "confirmation" of payroll records under this subsection should be truly random and not fall into a predictable schedule based upon how long the contractor has been on the project or has gone without a violation. It should also be understood that monthly is a minimum standard for these "random" confirmations, that is, confirmations not arising out of a complaint or information raising questions over the accuracy of the records. If a program receives a complaint or other information which reasonably suggests that payroll records are inaccurate, that will trigger a separate duty to confirm those records.

Comments on section 16432(d) [On-site visits]:

Keenan: The requirement of weekly site visits will undoubtedly increase the price of LCPs throughout the state. Most quality LCPs currently offer monthly visits. To quadruple that frequency will, we believe, lead to at least a 25% increase in price. It is not apparent to us that more site visits will lead to any corresponding increase in an LCP's effectiveness, certainly not when compared to a greater emphasis on upfront education and timely review of

certified payrolls. It would also unfairly punish those contractors with a proud and solid record of prevailing wage compliance by interrupting their production at the same rate as those who have not been so diligent.

Keenan (oral): We do not advocate weekly site visits due to the fact that in our experience, we don't think that's actually going to diminish the amount of wage underpayment claims filed. A lot of times when you go to the sites you get the same workers over and over, and actually all you're doing is curtailing or curbing the work that's being done, and the contractor that's in violation is already gone.

ALCP: 1. The use of the permissive "may" within the final sentence of this subsection sidesteps the most important elements of the field inspection. Checking the posting board and the availability of wage determinations, while important administrative considerations, has little impact upon effective enforcement. The field inspection is an opportunity to (1) observe activities on-site, noting crew levels and trade activities in progress, for later correlation with reported manpower and classifications and, (2) interview a representative sampling of workers on the site to determine key classification and pay rate data for later correlation with CPRs. [...] "May" should be changed to "shall". 2. We strongly urge the Department to change the words "each week" to read "each month". Monthly interview visits provide a format in which a majority of workers for virtually all contractors may interviewed in increments without serious interruption of their work. Random variation of intervals and schedules coupled with careful monitoring of daily crewing and activity records provide adequate opportunity to monitor operations; where "intelligence from the field" or discrepancies between reported payrolls and crewing records indicate a potential violation, more frequent visits can be employed. Weekly site visits will do little to increase effectiveness over the level of monthly visits but will make the labor compliance process disruptive and intrusive. The proposal for weekly site visits, aside from being pointless and completely onerous to contractors and awarding bodies, would create substantial and unjustified additional costs for LCP implementation.

ALCP (oral): While we think it can be overdone, we are not negative about the value of field inspection, which is a vital and important aspect of field enforcement.

CCMI: CCMI objects to requiring onsite inspections on a weekly basis. The regulation actually discusses checking the jobsite for certain posting requirements, but does not discuss the other onsite requirement of interviewing workers. CCMI assumes that perhaps the DIR also means to include onsite interviews as part of the weekly onsite inspection. The DIR should allow the LCP to exercise discretion to increase the number of onsite visits in a given month, but should not mandate weekly visits.

CASH: C.A.S.H. believes that on-site visits are part of confirmation or audit proceedings conducted when the LCP deems them necessary. Mandated site visits ensure no positive results. Such mandated site visits erode the real work to be conducted and bespeak of bureaucracy rather than professionalism.

City of LA: The OCC is currently monitoring approximately 580 projects of varying sizes. Attempting to monitor a project load of this magnitude with onsite visits conducted each week workers are present at the site would simply not be possible.

Parsons: Clarify if weekly site visits are mandated.

LAUSD: 1. The requirements in subsection (d) would create an insurmountable volume of work for the District's LCP. Although, the District recognizes the importance of in-person inspections, it currently has over 2,500 ongoing projects. The District simply does not have enough manpower to provide weekly inspections of all projects. Moreover, given the, District's and the State's budget crisis, the District cannot afford to hire additional staff to provide these inspections. Accordingly, the District requests an exemption from the requirement under this subsection. 2. The District requests the addition of the following underlined language: "Representatives of the Labor Compliance Program or the awarding body shall conduct in-person inspections..." This would allow an awarding body to use other personnel, aside from LCP staff, to meet the requirements of this Subsection.

WECA: WECA-IEC is concerned that the requirement of weekly visits may be too often, particularly if the contractor or subcontractor has a high level of compliance. Furthermore, WECA-IEC is concerned that the final sentence is too open-ended; the permissible activities of LCPs should be better defined than "other activities deemed necessary by the Labor Compliance program…"

SCC: Weekly site visits will become far too excessive on some larger projects where one bid package or scope of work is operational for several months at a time. Weekly visits under these circumstances would be redundant and a waste of state funds, not to mention that in this circumstance most all workers could be interviewed in one visit. Weekly on-site monitoring is also cost-prohibitive in that it may limit third-party LCPs from providing services outside their immediate geographic area [although] if all Awarding Bodies and LCPs were using the OPSC 1%, this would be as much of an issue. A less time-structured schedule should be adopted based on minimum requirements such as a number of interviews per contractor, or ensuring that each of the contractors' workers are present on the job site during at least one on-site visit, etc. SCC recommends language exact or similar to what is noted in the excerpt below.

> (d) Representatives of the Labor Compliance Program shall conduct in-person inspections at the site or sites at which the contract for public work is being performed ("On-Site Visits"). On-Site Visits may be undertaken randomly or as deemed necessary by the Labor Compliance Program, but shall be undertaken **not less than bi-weekly** during each ~~week~~ **period** that workers are present at sites at which the contract for public work is being performed **providing that each contractor and subcontractor's workers are present during at least one On-Site Visit**.

SCC (oral): We feel site visits are very important. We identify a lot of anomalies when conducting site visits. We generally spend half an hour to an hour on a project, and our

field technicians are trained to look for specific things. Weekly visits are a bit excessive if there's a large project where, say, a grading phase may be operational for a month or so, and going out there may be redundant, seeing the same individuals. We'd prefer a time-structured schedule with some kind of requirements for minimum reviews per contractor. Caltrans (oral): Caltrans does do site inspections; we inspect every project that's going on; we have project records, inspector diaries; we also have an interview policy in place.

CEA (oral): I think weekly inspections are appropriate when you have identified new contractors on site. I don't know that you need to go back to the same contractor again on that project, but certainly you need to identify all the second tier subs that will appear, most of the time, in the middle or near the end of the project when most of the construction is taking place.

Reed (oral): Our program believes it is important to have people in the field, and we have 16 investigators in the field every day. The minimum standard for site visits does not necessarily have to be weekly, but it has to be more than monthly. It depends on the size of the job and how long the contractor's going to be there, but you need to talk to all of them.

Solis (oral): 1. We believe weekly site visits would be unproductive and damaging and not support the success or effectiveness of compliance programs because the provision says little about what's to be done other checking for the posting of notices, which is an activity that doesn't need to be repeated multiple times throughout the month. The primary objectives that can be achieved on our site visits are (1) make observations concerning work activities -- check if they match work classifications reported on certified payrolls; (2) interview workers to confirm that they know they should be paid prevailing wages and are receiving the proper amounts; (3) identify apprentices to confirm level and status; and (4) make ourselves available as educators. Monthly interviews provide a format in which the majority of workers can be interviewed randomly without significant interruption of the work. Site visits are important, but they have to be random -- contractors can't be aware we're coming out. We believe weekly visits make the process disruptive, intrusive, which contractors and agencies alike would consider unacceptable and unnecessary. It would also provide a substantial increase in cost. We propose a minimum standard of monthly, to be conducted at random. 2. The requirement to make weekly site visits will be very onerous to programs serving smaller districts in rural areas.

SFUSD (oral): 1. Because of the number of schools being monitored at any given time, SFUSD does site visits and probably catches at least 70% of the wage deficiencies or violations that way. Instead of interviewing workers, sometimes we may take pictures or observe the scope work and then compare that with what's being submitted on certified payrolls. 2. DIR should develop a protocol describing what a labor compliance inspection consists of, including whether or not labor compliance officers should be required to give advance notice of a site visit.

SBCTC (oral): A rapidly changing workforce that's on the site needs to be monitored, and really the only way to do that is to be there on a weekly basis, which is not unreasonable.

Ravnik (oral): I don't think weekly site visits are onerous and would hope that the regulations require bi-weekly or semi-monthly visits at a minimum. While some activities go on for an extended period of time, there are also crafts that may be in and out in a couple of days, such as floor covering. What's important is not to review the same contractors over and over but to review every contractor on the site. It is also crucial that site visits be random. In my experience, I never saw a great deal of violations on the face of payrolls -- they come from workers. Most of the LCPs I've seen have the professionalism and discretion not to demand interviews in the middle of a concrete pour and know a lot of time is not required. Often just being there is all that is required.

WPF (oral): 1. I'd like to reinforce what others are saying about site visits. I've noticed that when you have an LCP out of LA or San Diego, and the contractor is up in Sacramento or Yuba City, you don't see the LCP very often. That's one of the problems in getting enforcement, because the people have no one to talk to when there's a violation. 2. The most important part of site inspections is to obtain a head-count -- to see if it jibes with what's reported on the certified payroll records.

Director's Response: No changes were made in the proposed language. Frequency of site visits turned out to be most contentious and disputed proposal in this rulemaking. However, claims that this requirement is unduly burdensome appear to be based on misconceptions about current practice and what is expected under this proposal. Awarding bodies already maintain a daily presence on public works construction sites in the person of a construction manager or resident engineer, and some labor compliance programs set up on site. Consequently, a weekly visit by a labor compliance program representative – the subsection does not dictate who that must be as long as it is a representative of the program – does not seem onerous even for the City of LA or LAUSD. Beyond checking to see that the required notices are posted, the subsection also does not require that site visits be devoted to any specific tasks; in particular it does not require workers to be interviewed or reinterviewed on each visit, although the representative should be available to any worker who may want to discuss compliance issues. The Director is persuaded that site visits are an essential component of the proactive monitoring that the labor compliance program model is designed to provide, and weekly visits are the appropriate minimum, given the limited number of days that some trades spend on a job site. ALCP's and WECA's suggestion to mandate or specify other required activities also were not accepted. The assumption underlying this minimum standard is that programs will approach the task conscientiously and conduct site visits in a meaningful productive manner according to the needs or concerns that surround any particular visit. Conversely, the Director anticipates that programs failing to conduct meaningful site visits or unduly interfering with ongoing work activities will become the subject of revocation complaints. SFUSD's suggestion to develop specific protocols for site visits is a good one; however, DIR does not have sufficient information at this time to determine what all should go into those protocols. The Director agrees in principle with the concepts that site visits should be random and unpredictable – so that contractors do not have the opportunity to prepare for them in advance – but also that visits and interviews not significantly disrupt work activity.

Comments on section 16432(d) after April 4, 2008 revisions:

ALCP: While ALCP recommends site visits twice a month, we appreciate the regulations picking up our concern about the importance of random site visits. Because of the increased staff and travel time, the proposed regulation significantly increases costs. We believe that site visits should result in real benefits to the program. Therefore, we recommend that the last sentence of subdivision (d) be made mandatory and that specific activities including employee interviews, recording of the data collected and retention of records in a manner suitable for audits be added to the section.

CCMI: CCMI objects to WEEKLY onsite interviews. With CCMI covering public entities from Chula Vista to Yreka, it is impossible for a single employee to audit all of our projects in a week. Currently it takes 2½ weeks on a full time basis to perform onsite interviews for all of CCMI's projects. CCMI would need to employ 3 employees to do the work now covered by one employee. This would substantially increase the cost of LCPs to public agencies, and is particularly difficult since a third party cannot delegate or subcontract out its authority to another individual or party. Requiring a location like Somes Bar on a weekly basis would involve substantial cost to the agency. CCMI's experience is that monthly interviews are sufficient. If there is a perceived problem, CCMI has conducted more frequent onsite interviews. Weekly visits would be extremely burdensome to third party administrators and would increase the costs of LCPs to public entities. Additionally, on smaller projects, CCMI often reinterviews the same employees. CCMI believes that if this proposal is implemented, there should be an enforcement mechanism to revoke programs that do not regularly comply (recognizing that from time to time unscheduled work may occur on a project in a given week which would not be picked up by a third party LCP in sufficient time to conduct an on-site interview). CCMI actively seeks to comply with all requirements, but will be disadvantaged and potentially put out of business by companies who undercut their price because they are not fully implementing the LCPs as directed by the DIR. If the DIR is intent on implementing a weekly onsite interview, then CCMI suggests that a Third Party LCP be permitted to delegate the onsite interview process to either a representative of the public agency or contract with an independent third party for the purpose of conducting these interviews. CCMI further notes that requiring weekly onsite interviews without requiring that those interviews be cross-checked with certified payrolls in the same week is an exercise in futility. Requiring weekly interviews but only random monthly audits works at cross purposes.

Director's Response: For reasons discussed in the response to comments on the initial proposal immediately above, the suggestion to mandate specific activities other than the checking of posted notices on every site visit was not accepted. Programs should understand that they have the flexibility to do whatever would be most productive relative to the task of corroborating reported work and wage payments and not feel compelled to do things that are redundant or pointless in the context of the project or work they are monitoring. The suggestion to add language specifying that programs have the authority to delegate the task of conducting site visits to public agency personnel or independent third

parties also was not accepted for the following reasons. First, an approved labor compliance program (awarding body or third party program) cannot contract out or delegate its authority to another person or program that is not approved as a labor compliance program, except in the case of obtaining services from certain licensed professionals. On the other hand, the regulations do not control who a program may hire or where or what schedule those employees must work, as long as those employees are under the direct control of the approved program and the program takes full responsibility for the actions of those employees. CCMI and others have offered a number of comments about the economics of operating a labor compliance program and of complying with specific requirements such as weekly site visits. While some have attempted to quantify the costs of doing more than they do currently, none has offered base data on what it does or "should" cost to operate a proper labor compliance program. In any event, the Director's regulatory requirements for labor compliance programs must focus on how to ensure proper enforcement of prevailing wage requirements under the Labor Code and not on how to make the work more profitable or convenient for third party programs that have sprung up to provide this service. That a program has agreed to provide service in a distant and remote location but wants to do so at a reduced level because of the travel involved is not an appropriate compromise to impose on the workers and contractors at the distant or remote site, who are entitled to the same legal protections as any other workers and contractors in the state. It also must be recognized that saving money for awarding bodies is not a valid legal justification for curtailing or limiting the enforcement of prevailing wage requirements under the Labor Code. Courts recognize that the desire to hold down construction costs provides awarding bodies and contractors with "strong financial incentives not *to comply with the prevailing wage law." (*Lusardi Construction Co. v. Aubry *(1992) 1 Cal. 4th 976 at 987 [emphasis added].) The specific performance standards in these proposals may be what are needed to get underperforming programs to prioritize the enforcement responsibilities with which they are entrusted. However, if programs do not accept and perform their responsibilities in the manner required by these regulations, the enforcement mechanism will be through a complaint for revocation under section 16428.*

Comment on sections 16432(e) [Audits]:

ALCP: ALCP has consistently supported vigorous but reasonable and transparent procedures for the conduct of investigations and in any subsequent enforcement actions. We find the provisions of sub-item (e) within Option B to be supportive of that position.

Director's Response: No response required.

Comments on sections 16432(f) [Notification to Contractors]:

Caltrans: Subpart (f) adds language for allowing contractors to submit exculpatory information in support of good faith mistakes but shortens the time frame for a contractor to respond from the 30 days listed in Option A to 10 days. It has been this department's experience that compliance can usually be achieved within a 30 day time frame, and historically, Caltrans has provided its contractors with a 30 day time frame for responding. Shorten-

ing the time frame down to 10 days will create additional burden on both Caltrans and DIR by submittal of formal penalty assessments in every scenario in which a contractor could have complied if provided with 20 additional days. If DIR must keep this requirement, Caltrans suggests adopting the 30 day time frame for those LCPs whose contracting dollars are in excess of $1 billion or have extended authority.

Caltrans (oral): Requiring programs to submit documentation of resolved complaints is onerous given the number of complaints we resolve. We suggest that DIR do a quarterly audit of maybe one violation, rather than asking that all information be submitted.

WCS/Ca: WCS strongly suggests that a statewide database be available for LCPs in order to track previous violations. The data base could be added to the DLSR website, under Labor Compliance, where LCPs are given a password to obtain information (which is not for public disclosure) to include contractors name, license number and violations (include only the relevant Labor Codes). This would greatly assist since it is not uncommon for contractors to be found in violation, correct underpayment and then proceed to do the same on another project, with another labor compliance program monitoring for that District.

ALCP: ALCP has consistently supported vigorous but reasonable and transparent procedures for the conduct of investigations and in any subsequent enforcement actions. We find the provisions of sub-item (f) within Option B to be supportive of that position. With regard to the aftermath of the LCP having resolved a deficiency through informal procedures, the requirement that the LCP maintain a written record of the circumstances and exculpatory information that resulted in such an outcome, but not be required to report it to the Labor Commissioner is properly and constructively tailored to the labor compliance concept. While maintaining the information on file provides a basis for subsequent audit by DIR/DLSE of such decisions, the fact that it does not immediately result in any mandated report to the Labor Commissioner is a very important element in encouraging contractors to deal cooperatively with the LCP and to resolve underpayments promptly. If each directed correction must result in a formal report to the Labor Commissioner, most contractors will see little incentive in complying with the LCP's direction or in making timely and cooperative restitution to the workers. We acknowledge, however, that this very constructive tool could be abused by an intentionally underperforming LCP by allowing repeated informal correction without penalties by the same contractor and never elevating violations to the level of formal enforcement and penalties. Some form of summary reporting, at year end, or some maximum threshold of underpayment value may be necessary to minimize or preclude such abuse.

CCMI: CCMI supports the DIR's attempt to limit the amount of reporting required for minor violations and in granting LCP's discretion to resolve small wage violations and penalties. However, this section needs to more clearly define and limit the circumstances under which an LCP should be allowed to waive penalties. CCMI supports the ability of qualified LCP's to assume the responsibility for waiving of penalties, but greater definition and parameters need to be included. Specifically, the ability to waive penalties should only be granted to LCPs with expanded authority (NOT all LCPs). There are already too many

LCPs which do not accurately enforce LCP requirements. Secondly, the ability to waive penalties should fall into a clearly defined limit i.e. waiver of a penalty for good faith should be limited to a waiver when the error is less than $1.00 an hour. Or, when the error is due to a failure to recognize a ** increase, the total penalty does not exceed $500.00. Finally, does the ability to waive the penalty for a good faith error mean it is a single opportunity to waive penalties? What if there is a second "good faith error" on a subsequent project? CCMI's reading of the provisions of 1775(b) requires a reduced penalty be implemented and not another full waiver for a "good faith mistake." Will DIR be maintaining a database or some way for LCPs to determine whether a contractor has previously had a waiver or reduced penalty?

CSU: CSU finds this particular subsection valuable in clarifying the standard and/or procedure for resolving wage claims, allowing many claims to be resolved at an early juncture without the need to flood DLSE with Requests for Forfeitures when "exculpatory information" is promptly provided. The subsection is particularly helpful in placing the burden on the affected contractor(s) to submit "exculpatory information" within 10 days. However, since unforeseen circumstances related to obtaining documents may pose difficulties, CSU recommends that the statute allow the Labor Compliance Program to extend the timeframe to submit exculpatory evidence at its reasonable discretion. CSU also recommends that contractors be required to provide exculpatory documents in their possession within the allotted time frame in order to be able to rely on those documents in a review proceeding. This would assist Labor Compliance Programs in obtaining documents timely, which would result in substantial time and cost savings by discouraging from providing piecemeal documents audits and review proceedings.

Parsons: Clarify whether it is 10 days or 30 days for contractors to enact the "the good faith mistake" [referring to competing provisions in Options A and B].

LAUSD: 1. The District is unsure whether a resolution under this provision would prohibit the collection of payment for penalties. The District requests clarification as to whether or not a penalty in accordance with Labor Code §1775(a)(2)(B)(i) can be assessed under this provision. 2. The District suggests that this provision be modified to require any exculpatory or mitigating evidence to be submitted within 30 days, not only the "good faith mistake" evidence.

Best Best: 1. We respectfully request that Districts be provided with the same flexibility to waive good faith errors committed in the timely production of certified payroll records as Districts are afforded in Section 16432(f) of the Proposed Regulations for the good faith underpayment of wages. 2. We understand that the Labor Commissioner, through the Proposed Regulations, desires to undertake a continuing role overseeing the enforcement activities and levels of LCPs. However, we are concerned that the LCP's oversight will be undermined in determining what constitutes a "good faith mistake" under Section 16432(f). Moreover, Section 16435.5 of the Proposed Regulations provides for the withholding of contract payments but does not reference the good faith mistake provisions of the Proposed Regulations. 3. Finally, although there is no timeline set forth in the Proposed Regula-

tions, we trust that the Labor Commissioner will timely identify issues in the exculpatory evidence of a good faith mistake so that a project may be closed out.

WECA: In line three "may" should be changed to "shall" which will obligate the LCP to notify the contractor or subcontractor that an underpayment of wages has occurred.

Reed (oral): Clarify whether "no knowledge that the contractor and affected subcontractor have a prior record" requires research and documentation.

Director's Response: WECA's suggestion was accepted, and the word "may" in line 3 was changed to "shall," so that a program is required to give a contractor notice of an opportunity to resolve a wage deficiency prior to seeking approval of a forfeiture by the Labor Commissioner. The 10 days allowed for contractors to provide exculpatory information is a minimum rather than an absolute time limit, which means that a program may allow a limited amount of additional time to respond, consistent with the objective of reasonable, vigorous, and prompt enforcement expressed in section 16421(e). The minimum notice period was set at 10 days rather than 30 in recognition that there may be occasional instances in which programs will be faced with short statute of limitations deadlines to commence a formal enforcement case.

The suggestion to set up a statewide data base was not accepted at this time because the full ramifications are not known. However, it will be studied further by DIR along with other information sharing suggestions under the uncategorized comments above. The "knowledge" that the program must apply under this subsection is information of which it actually aware or reasonably should be aware (such as from its own records or information generally known in the public record). Further research would be required if a data base is developed or there is formal information sharing as has been suggested.

As ALCP notes, this subsection requires programs to maintain rather than submit written records on resolved complaints. The summary year end reporting suggested by ALCP in fact is a required element of the Annual Report forms, as noted in SCC's comment.

With regard to the assessment and waiver of penalties, this subsection confers the authority to settle a wage and penalty assessment one time *for a given contractor or subcontractor. It could not be used a second time for the same contractor or subcontractor, since the labor compliance program would necessarily have knowledge of a prior failure to meet prevailing wage obligations based on the matter that previously was settled. A program also is not compelled to waive nor prohibited from collecting some reduced amount of penalties as part of the settlement, provided that the wages determined to be due are fully and promptly paid to the workers. With regard to other comments raised by CCMI and Best Best, Labor Code Section 1775(a) confers discretion to determine penalties for wage underpayments on the Labor Commissioner, and it also prescribes minimum penalty amounts under prescribed circumstances. The statute and existing regulations can be construed as requiring* all *wage findings to be referred to the Labor Commissioner for the determination of penalties, although in practice that has not occurred, and some programs*

have routinely waived all penalties under any and all circumstances because they were unwilling to pursue formal enforcement or considered it contrary to their educational mission. This new subsection confers limited discretion that did not previously exist in order to place reasonable limits on that practice and free programs from the obligation to seek the Labor Commissioner's approval to assess and resolve minor violations based on good faith errors. While it might be appropriate, as CCMI suggests, to set further parameters on what constitutes a "good faith" error, that involves issues of substantive law that are beyond the scope of these proposals as well as discretionary authority that is committed expressly to the Labor Commissioner rather than to the Director. Finally, with respect to Best Best's request for discretion to waive penalties for untimely production of certified payroll records, those penalties are mandated by Labor Code Section 1776(g), which, unlike Section 1775(a), confers no discretion to waive or vary the amount of the penalty.

Comment on section 16432(f) after April 4, 2008 revisions:

CCMI: CCMI is unclear as to the intent of this section, and specifically whether it means an LCP can waive any or all of a penalty amount due under Section 1775 for a wage violation. There currently are too many LCPs (both agency and third party) which reduce or waive penalties without proper documentation or providing this information to the Labor Commissioner for review at the end of the project. In light of the strict statutory mandate of Section 1775, CCMI proposes that "Only LCPs with extended authority be granted the authority to reduce or waive penalties without the Labor Commissioner's approval."

Director's Response: This suggestion was not accepted because it would apply to very few programs and, as discussed above in the response to the earlier comments on this section, defeat the purpose of this provision to authorize and place reasonable limits on something that has been occurring in practice. Programs will be required to disclose information about settled claims on their annual reports, and pursuant to this subsection will be required to maintain documentation that will be subject to review by DIR.

Comments on Appendix following section 16432 [Audit Record Worksheet Forms]:

Caltrans: Caltrans does not currently use those forms. Caltrans suggests language allowing LCPs with extended authority to use existing forms already approved by the Labor Commissioner.

CCMI: CCMI already compiles all of this requested information using forms we have created and would rather continue to do so than to use these forms.

Director's Response: Proposed subsection (e) of section 16432 states that an Audit which uses these forms and includes other specified information will be "presumptively" sufficient. In other words, use of these forms is strongly recommended but not required.

Comments on section 16434 in general:

Caltrans: Caltrans strongly supports the adoption of Option A. Caltrans recommends against the use of Option B because it imposes unreasonable and unnecessary burdens on large LCPs in terms of responding to complaints and maintaining separate summary enforcement records.
WCS/Ca: WCS endorses Option B as more thorough and provides that LCPs have to demonstrate understanding and knowledge for enforcement purposes.

ALCP: Option B is, by far, the most constructive and meaningful treatment of the issue.

City of LA: The OCC is a strong proponent of modification of both the Labor Code and the California Code of Regulations to allow qualified, experienced, productive LCPs to assist the DAS in its enforcement efforts by authorizing those LCPs to exercise greater control over apprenticeship matters on their own projects. With this in mind, we support Option B with modifications [as described in comments under individual subsections below].

Reed: My strong recommendation is for Option B. This option provides for accountability to complainants, verification of Fund Contributions the requirement to maintain separate written summaries of compliance activities for each project. Option A has no requirements for these very essential parts. Subpart (e) in Option B would be a welcomed provision but only if fiscally possible. I would also like to see the language from (b)(5) of Option A included in (c)(2)(B) of Option B.

LAUSD: The District prefers the implementation of Option A over Option B. The requirements in Subsection (b) in Option B would create an insurmountable volume of work for the District's LCP.

SCC: Option [A] is preferred because the methodology of reporting is not exactly specified and allows for some control in generating the summary.

SBCTC (oral) and Ravnik (oral): Support Option B.

Director's Response: Option B was selected because it includes a complaint handling procedure, which is an essential part of remaining responsive to the public, and a project summary reporting form, which was first proposed in the 2004 rulemaking and provides specific guidance to programs on what information to compile and how to organize that information for a prevailing wage enforcement case. Commenters who preferred Option A did so primarily on the basis of objections to these two provisions. However, those objections were based on misperceptions about the requirements – specifically that the complaint procedure required ongoing communications with all potential wage claimants rather than just the person or entity who complained, and that the summary reporting form was a mandatory form that had to be filed rather than an organizational tool for information that needs to be retained. Many of the specific comments concerned overlapping provisions of the Options and are discussed in connection with specific subsections below.

Comment on section 16434 after April 4, 2008 revisions:

City of LA: We continue to support Option B with the modifications previously proposed to delete subsection (b), subparts 1, 3, 4, and 5, and to amend subsection (c) to authorize exemplary LCPs to assist the Division of Apprenticeship Standards with the enforcement of apprenticeship requirements on public works projects.

Director's Response: The City of LA resubmitted the same modifications suggested in its comments on the initial proposals. These suggestions are responded to fully in the Director's Response to the initial comments on sections 16434(b) and 16434(c) below.

Comments on specific provisions of Option A proposals for section 16434:

Comments on specific provisions of Option A were offered by Caltrans, ALCP, CCMI, CASH, CEA, LAUSD, Best Best, and SCC.

Director's Response: Because Option A was not adopted, it is not necessary to address comments on specific aspects of Option A. However, insofar as any of these comments addressed language in Option A that was also used in Option B, the comment is summarized and responded to under the relevant subsection of Option B below.

Comments on section 16434(a) [Duty to Enforce like Labor Commissioner]:

John Young: Review the DBRA handbook and try to incorporate changes to the State enforcement policies which would make them the same or similar as the DOL. A former DIR director has expressed the view that DIR needs to be on the same page as DOL regarding enforcement practices.

Caltrans: Subpart (a) requires LCPs to enforce requirements " ...in a manner consistent with the practice of the Labor Commissioner." 1. It would be helpful to describe these practices here or reference any section where these practices are described in detail because the Labor Commissioner has the authority to enforce all requirements set forth in the labor code. Approved LCPs only have the authority to enforce the public works sections of the labor code. There must to be a clear definition of what the labor compliance program shall enforce and what the program must refer to DIR for enforcement. 2. The Initial Statement of Reasons specifically cites the necessity for a standard complaint procedure due to the lack of LCPs responding to complaints, resulting in additional complaints forwarded to DIR, other agencies, and the Legislature. Caltrans agrees with written standards for complaints and believes those standards should be combined with a clear definition of what the LCP may enforce within the scope of its program. Caltrans receives numerous complaints seeking adjudication of issues outside the scope of its LCP authority even though the work is performed on a Caltrans project. 3. Caltrans relied heavily on precedential coverage determinations in the past and supports the decision to allow Caltrans to continue relying on the now advisory coverage determinations.

ALCP: Clarify where labor compliance programs may ascertain the practice of the Labor

Commissioner.

CCMI: It would be helpful if there was a prompt process whereby an LCP could submit questions regarding prevailing wage determinations and receive a prompt answer. Inquiries to the DIR and its various divisions sometimes languish for months without a response. In several cases, more than six months. While we understand that specific issues may not always be able to be resolved promptly, some items should be easily resolved (i.e. clarification of a footnote relating to Saturday overtime should be a simple matter).

Best Best: The reference to the Labor Commissioner utilizing the precedential public works coverage determinations posted on the Department of Industrial Relations web site as a source of information and guidance in making law enforcement decisions is contrary to our understanding that the determinations are no longer to be utilized as a reference for a public agency. We would appreciate clarification on the matter.

Director's Response: First, while more consistency between federal and state enforcement policies may be desirable in the abstract, the policies necessarily are different because of differences in the underlying statutes, as well as differences in policy decision-makers, budgets, and practical concerns that may require state and federal regulators to view their tasks differently. It may be helpful to look into this further, but the suggestion is beyond the scope of these proposals.

Second, the current enforcement policy of the Labor Commissioner may be ascertained through training provided by the Division of Labor Standards Enforcement, individual inquiries, and policy letters that may be issued from time to time, as well as individual enforcement case decisions issued by the Director or a court. In most situations, enforcement requirements should be apparent from the language of statutes, regulations, and general wages determinations, and a program should look first to its own legal counsel for guidance in interpreting legal requirements before seeking further policy guidance from the Division of Labor Standard Enforcement on a particular issue that genuinely needs clarification. A program should not seek DIR's opinion simply because a contractor has disputed the program's interpretation of prevailing wage requirements – doing so places unnecessary demands on DIR's limited resources, may interfere with DIR's statutory responsibility to hear and decide any contractor's appeal under Labor Code Section 1742, and defeats the purpose of having awarding bodies take responsibility for their own enforcement by adopting a labor compliance program.

Ideally the Division of Labor Standards Enforcement would like to be able to prepare and make available a public works enforcement policy manual; however, that depends on having the necessary resources and avoiding underground rulemaking issues. Regarding Caltrans' related request for clearer guidance on the dividing line between public works issues enforced by labor compliance programs and other non-public works issues enforced by the Labor Commissioner, Caltrans correctly notes that an approved labor compliance program only has authority to enforce the public works sections of the Labor Code. Thus, beyond breaking down public works apprenticeship enforcement responsibilities, as is be-

ing done in proposed subsection (c), it is not clear what additional guidance is needed, nor is DIR aware that this is a particular problem for other programs.

Finally, as indicated in Caltrans' third comment, DIR discontinued the practice of designating any public works coverage determinations as precedential. However, DIR continues to post individual coverage determinations on its website. Enforcement agencies may look to those determinations for information and guidance on how the Director might interpret coverage requirements in a given situation, subject to the caveat that individual determinations have no binding effect in any other matter.

Comments on section 16434(b) [Complaint Procedures]:

Caltrans: Subpart (b)(4) would require LCPs to provide written updates to complainants every 30 days. Currently, Caltrans acknowledges receipt of the complaint within 10 days and then notifies complainants within 30 days of the results of the preliminary review and any investigation needs. Finally, Caltrans attempts to complete full investigations within 60 days after receipt of the complaint and provide the complainant with a resolution notice. Due to complexity, Caltrans may not be able to resolve the issue(s) within the 60 day time frame. Requiring updates every 30 days to all complainants would add an additional burden due to the size of Caltrans' LCP and the volume of complaints received with multiple complainants involved. If there are 10 complainants per case and Caltrans has only four current cases, this Option would require that Caltrans send 40 letters per month. Caltrans recommends adopting its policy of investigating and responding to complaints with the requirement to provide updates after the initial 60 days have expired.

Subpart (b)(5) would require LCPs to provide complainants regular status reports regarding"...the status of a complaint that has been resolved by the Labor Compliance Program but remains under review or in litigation before another entity." An LCP cannot provide information regarding a legal action to which it is not a party. This is unreasonable because it imposes an ongoing responsibility on the LCP to obtain information that is beyond the scope of its authority or duty. Caltrans recommends striking this sentence or revising it to indicate the labor compliance program will send a letter to the complainant summarizing the results of the complaint investigation and where it has been referred to, if necessary.

CCMI: CCMI objects to the time frames set forth in subparagraphs 4 and 5. Providing monthly updates to the complaining party does not further the investigation or assist in the resolution of the case. If the third party is a worker who may be entitled to wages, then an update every 60 days is appropriate. It is CCMI's experience that a vast majority of third party complaints do not come from workers but rather from "watchdog groups". Further, if the matter is resolved by the LCP and proceeds to another level of litigation or appeal, a third party LCP provider does not always know the status. For example, the University of California's legal department would step in to handle an appeal or writ of mandate. A timely response to a third party complainant is important but should not be mandated along a specific timeline. An LCP should not be under an additional obligation to notify a third party of the progress of an investigation or appeal if the third party LCP is no longer direct-

ly involved in that process.

City of LA: Delete subsection (b), items 1, 3, 4 and 5. The requirement to repeatedly notify complainants would place an undue burden on any awarding body with a large number of projects. For example, our office has 25 complainants on one project alone. [Describes case before hearing officer that is a year old, asserting that 350 pieces of correspondence would be required under proposal. Further notes that City currently monitors approximately 580 projects.] Another issue of concern is the well-known fact that a large part of the workforce employed in construction is of a transient nature. Trying to stay current with the whereabouts of the individuals employed on a particular project would be a full-time challenge in itself. While well-intentioned, items 1, 3, 4 and 5 of subsection (B) are simply not practicable.

LAUSD: The requirements in Subsection (b)(1),(3),(4), and (5) would create an insurmountable volume of work for the District's LCP. The District has 400 to 500 active cases on any given day. The number of complainants would be unmanageable for some of the requirements in this subsection. With regard to Subsections (b)(1) and (3), the District request 30 days to complete this task for LCPs with final approval/extended authority. With regard to the updates required by Subsections (b)(3) and (4), the District requests an exemption for LCPs with approval for at least five years provided that complainants are informed that they may request an update from the LCP at any point in time.

Director's Response: Suggestions to delete or modify this subsection were not accepted. The body of each of these comments shows that the commenter misunderstood its requirements. In particular, three of the commenters apparently believe that they will need to provide continual notifications to every worker with an actual claim instead of just the actual person or entity who submits a written complaint. Going through a watchdog group representative may in fact cut down on the numbers of individuals the program must communicate with. Regarding matters under review by another entity, the Director notes first that "resolved by the Labor Compliance Program" means the program has (1) decided to take no further action on the complaint, (2) settled the complaint with the affected contractor or subcontractor, or (3) issued a formal Notice of Withholding of Contract Payments under Labor Code Section 1771.6. Thereafter, if a Notice of Withholding is issued and the affected contractor or subcontractor requests review, 90 day status reports must be provided, though the reports may have nothing more to say than that the case remains pending before a hearing officer or court. As long as a program maintains a role in the case, including ultimate responsibility to carry out the terms of any hearing or court determination, it should be staying abreast of the case and be able to make the status reports. Conversely, the program is not required to report on litigation that does not arise out of the complaint or in which the program or the awarding body it represents has no role. Finally, the Director notes that Caltrans' complaint procedure, as described in its written comments, appears to comply with the requirements of this proposal.

Comments on section 16434(c) [Apprenticeship]:

John Young: There has been some confusion regarding LC 1777.5 regarding the employment and training of apprentices. The DBRA also addresses this issue as well, as I have had some conflicting direction from the DLSE/DAS.

Caltrans: Caltrans complies with each item in this subpart [as set forth somewhat differently in Option A] and supports DIR's proposed addition to the regulations.

ALCP: The definition of the term "higher" needs to be addressed. Is this the overuse of apprentices or the failure to use them at the minimum ratio expressed in 1777.5(g)? It is the clearly expressed policy of DLSE that it will not entertain or approve withholdings based on alleged apprenticeship ratio violations of any kind. The mandate, then, that an LCP require that regular prevailing wage rates be paid, as an underpayment issue, "where apprentices have been employed in a ratio higher than permitted under Labor Code Section 1777.5(g)" is impossible to comply with. The most that an LCP can do regarding a ratio issue, under current circumstances and policy, is to file a notice of discrepancy with DAS, which even DAS is unenthusiastic to entertain.

CCMI: It would be helpful if the DIR would issue clear interpretations relating to the interpretations that LCPs are to give to unsupervised apprentices or projects when there are more apprentices working than allowed under the DAS standards. CCMI continues to receive conflicting direction from the DAS (who says these items are wage violations) and the Labor Commissioner's Office, who says these are not wage violations, but only "apprenticeship violations to be referred to the DAS."

CASH: An LCP cannot easily verify apprentices listed on certified payroll records (CPR) as duly registered apprentices when personal identification information is redacted on CPRs. LCPs are in no position to enforce this proposed regulatory requirement.

CEA: Delete item (D) concerning employment of apprentices in ratio higher than permitted under Labor Code Section 1777.5(g). There is no provision in law whereby a contractor or subcontractor who violates apprentice to journeyman ratio levels pursuant to 1777.5(g) triggers an underpayment of prevailing wages. Penalties for noncompliance of apprentice ratios are provided in Labor Code Section 1777.7 and are determined by the Chief of the Division of Apprenticeship Standards. The following existing statutes and regulations require the Division of Apprenticeship Standards to take the appropriate enforcement action against contractors who violate apprenticeship laws with the exception of the issue of wage underpayments which is the enforcement responsibility of the Division of Labor Standards Enforcement: [Citing and quoting from Labor Code §§ 1773.3, 1777.1 (a) & (b), 1777.7 (a) (1) & (2) and (b), and 8 CCR §16436 (b) & (3); and also noting general rules governing apprenticeship program complaints at 8 CCR §§ 200 et seq.]

City of LA: Modify subsection (c) to allow LCPs who have established themselves as exemplary programs to assist the DAS in its enforcement of apprenticeship matters. The proposed modifications to subsection (c) would establish a legislative basis and create a practical inter-agency structure to allow qualified LCPs to facilitate enforcement of ap-

prenticeship violations in conjunction with the DAS. [The City proposed specific language to create this authority and also attached a legislative proposal on the same subject.]

Reed (written and oral): I would also like to see the language from (b)(5) of Option A included in (c)(2)(B) of Option B. Insert the word "journeyman" between "regular" and "prevailing wage rate".

LAUSD: The District requests that this regulation require DAS to set up an electronic mailbox to receive the notices of complaints, ratio violations and other apprenticeship violations. The District would issue a substantial number of such notices to DAS, and it would be most efficient and effective to send them electronically.

Director's Response: In response to the comments about the "ratios" language, subpart 2(D) was redrafted to provide clearer guidance on when and how to enforce prevailing wage requirements relative to apprenticeship ratios, consistent with the policy of the Labor Commissioner as expressed in generally circulated correspondence. The redrafted language also incorporates the language from Option A [regular prevailing rate required for workers not duly registered as apprentices] as suggested by Reed. However, the word "journeyman" was not incorporated since it is not a term used in the public works statutes and regulations and might connote a different or more limited meaning than intended.

The Director recognizes that prevailing wage enforcement with respect to apprentice ratios remains a continuing area of controversy, with some taking the position espoused by CEA that a ratio violation does not trigger an underpayment while others contend that underpayments may be triggered on a daily basis if maximum ratios are exceeded or if apprentices work unsupervised or on tasks outside their own craft. The intent of this regulation is to provide guidance on the Labor Commissioner's practice, which is the one that labor compliance programs must follow, and not resolve the other controversies, which will require further study and consideration.

The City of LA's suggested modifications were not accepted because they are outside the scope of these proposals and likely require legislation, which DIR understands is being pursued currently by the City of LA. LAUSD's suggestion that the Division of Apprenticeship Standards be required to set up an electronic mailbox to receive notices of complaints and violations is also outside the scope of these proposals but will be given further consideration by DIR to determine if it is appropriate and feasible. With regard to the concern raised by CASH, labor compliance programs are entitled to and should be getting unredacted certified payroll records as agents of the awarding body empowered to enforce state prevailing wage laws. DIR is aware of programs that do verify apprenticeship registration through DAS and has not heard about any specific programs experiencing the difficulty noted by CASH.

Comments on section 16434(c) after April 4, 2008 revisions:

ALCP: In item (c)(2)(D), we suggest replacing the undefined term "regular" that precedes

"prevailing wage" with the word "journeyman."

CCMI: CCMI applauds the clarification in this section relating to apprentices. However, this still does not address the issue of unsupervised apprentices. The DAS regulations do not allow an apprentice to work unsupervised and many conversations between CCMI and the DAS staff have resulted in CCMI being told that an unsupervised apprentice is a wage violation that requires journeyman scale wages to be paid. Finally, CCMI finds that calculating ratios of apprentices at the end of the project is extremely burdensome on the contractor as well as an LCP. The DAS has set certain ratios for the purpose of properly training apprentices. It is a simple thing to determine if an apprentice or an appropriate number of apprentices are employed with the proper number of journeymen in a given week (all on one certified payroll), but a totally different process to have to add up all journeyman hours and all apprentice hours at the end of the project and THEN tell the contractor they are out of compliance and have a wage violation. This type of "gotcha" approach at the end of a project does not go over well with contractors and creates a confrontational atmosphere which makes compliance and appeal issues more difficult. The DAS regulations relating to the proper ratio of apprentices to journeyman needs to be enforced and dovetail with these regulations. CCMI suggests that that language in (c)(2)(D)(ii) be changed to read "for all hours in excess of the maximum ratio (apprentice to journeyman) allowed by the DAS for that job classification for each day worked."

Director's Response: For reasons discussed in the response to the initial comments on this section above, these suggestions were not accepted. The term "regular" should be understood in terms of everyday usage, which in this context simply refers to the rate that would apply for that classification for anyone who is not a registered apprentice. The terms "journeyman" is problematic for the reasons previously noted. The issues surrounding enforcement of maximum ratios are also discussed in the response to the earlier comments. The purpose of this section is to provide guidance to labor compliance programs on required enforcement practices and not to define or redefine either the substantive rights of apprentices employed on public works or how enforcement responsibilities are divided between the Labor Commissioner and the Division of Apprenticeship Standards. Consequently, CCMI's comments are beyond the scope of these proposals but will be forwarded to the two other divisions for their consideration.

Comments on section 16434(d) [Project Summary] and Appendix following section 16434 [Suggested Single Project Report Form]:

Caltrans: Caltrans maintains its labor compliance enforcement records in electronic databases in each of its twelve district offices. In addition, Caltrans has in excess of 600 going construction contracts in excess of $10 billion at any given time. To require a separate summary sheet for each public works contract would be overly burdensome on an LCP of our size. Caltrans recommends amending this section to apply only to those LCPs with programs under $1 billion in contracting dollars or those LCPs with less than three years experience in labor compliance enforcement.

WCS/Ca: WCS strongly endorses the use of Appendix D: Suggested Single Project LC Review and Enforcement Report Form.

ALCP: On item 9 of the Appendix, delete "____ Annual report this project." There is no provision, in statute or regulation, for an annual report to be filed, by project. This Appendix is properly to be developed over the course of the project and maintained on file.

ALCP (oral): This Appendix is shown as a suggested format. We have no objection to that kind of summary reporting at the end of a project so long as it remains a suggestion. We have the information but might report it through a lot of reference rather than filling out the sheets. We prefer this option for maintaining information over Option A requirement for mandatory submittal to the Labor Commissioner.

CCMI: CCMI objects to the new proposed Appendix form. CCMI finds it to be confusing and overly burdensome. First, we are unclear as to when this would be used. We find the form cumbersome by requiring the listing of each contractor/subcontractor and the weeks all certified payroll records were received, all classifications listed on CPRs, listing all worker interviews, etc. While CCMI does all these things for all weeks of a project, to require us to then list each of these tasks again with specific dates and times can be particularly cumbersome. CCMI thinks this might be a good checklist for the DIR to use to randomly check and confirm that LCPs are complying with the necessary requirements. However, to require this document for all projects is overly burdensome and will increase costs to the agencies without any measurable results.

City of LA: Remove the requirement from subsection (d) to maintain a separate, written summary of labor compliance activities and relevant facts pertaining to each individual project. While we recognize the merits of maintaining standardized enforcement records, we are currently monitoring approximately 580 projects and maintain a project status log and other tracking materials on each. Adding the written summary would duplicate a tremendous amount of unproductive work.

SCC: The majority if not all of the information requested on the form is usually archived in one way or another by LCPs. The formality of the summary report for each project is needless and time consuming when most requests for this information, even as detailed as on the form, can be generated into a summary report for a specific project within the stipulated 60 day timeframe.

Director's Response: What the proposal expressly requires is that programs maintain, *by project, a separate written summary of compliance activities and facts which demonstrates that reasonable and sufficient efforts have been made to enforce prevailing wage. This particular form was developed during the 2004 rulemaking in response to widespread complaints that these regulations did not provide sufficient guidance to labor compliance programs on what they are supposed to be doing. As with the Audit Report Forms following section 16432, this is only a* suggested *format, it can serve as a checklist for programs and DIR alike to confirm that the appropriate activities are being undertaken. Maintain-*

ing the information electronically is appropriate as long as a written report can be generated from those records. The remarks of the commenters above indicate that they already track compliance activities and facts in a manner that appears to comply with the express requirement of subsection (d). Regarding ALCP's suggestion to delete the Project Annual Report option in item 9 of the form, this is merely an organizational tool for segregating information by year, including for any separate reporting purposes, when a project is ongoing. Again, it is not a mandatory form, and there is no requirement that it be filed.

Comments on section 16434(d) and Appendix following section 16434 after April 4, 2008 revisions:

CCMI: 1. CCMI suggests that the terminology when records are to be kept for at least one year after the "acceptance of the public work" should be changed to 1 year after the "filing of a Notice of Completion". State law recognizes "acceptance of the work" by a public agency as the filing of a Notice of Completion. CCMI believes it would be clearer for public agencies and LCPs if the terminology "Notice of Completion" was used. 2. CCMI remains troubled by this appendix as being unduly burdensome. However, we also recognize the DIR's need to properly monitor and audit those LCPs who may not be properly complying with all LCP requirements. CCMI assumes that the reference in Paragraph #9 which states: "Annual report for this project" means that an annual report for the project would be due even though the project is still ongoing and has not been completed. If CCMI's understanding is in error, then further clarification of that section is necessary.

Director's Response: The suggestion to change "acceptance" to "Notice of Completion" was not accepted, simply because for a completed project there will always be an "acceptance" but not always a Notice of Completion. (See Department of Industrial Relations v. Fidelity Roof Company *(1997) 60 Cal.App.4th 411, 418.) The meaning of "Annual Report" as used on this suggested form is clarified in the response to the initial comments on this subsection and form immediately above.*

Comments on section 16434(e) [Training]:

WCS/Ca, ALCP: In the first line change the word "may" to "will" or "shall."

CCMI: CCMI agrees that the Labor Commissioner (or DIR) should provide sponsors or endorse training. However, more important is DIR's need to clean house of Labor Compliance Programs that do not enforce the requirements of Labor Code Section 1720 et seq.

Director's Response: While it might be desirable to mandate the Labor Commissioner to provide training, it is not feasible to make that commitment at this time, and an empty commitment should not be placed in a regulation where it might be cited as a reason to excuse a program's failure to carry out its responsibilities. DIR notes that it did participate in the development of LCP-specific training provided through Fresno City College; it conducted a training session for the public works community on April 1, 2008 in Sacramento and has scheduled another one for September 17, 2008 in Los Angeles; that DIR

staff sometimes participate in training offered by other organizations; and that we are continuing to explore ways to make more training available, including possibly on-line. CCMI's comment does not require a further response.

Comment on section 16434(e) after April 4, 2008 revisions:

ALCP: This subsection includes ALCP's suggestion that additional professional development will help to standardize industry practices and improve compliance. Our membership applauds this effort by the Department and stands ready to assist in the development of programs.

Director's Response: No substantive modifications were made to this subsection in the April 4, 2008 revisions, and no further response is required except to express the Director's appreciation for ALCP's offer of assistance.

Comments on section 16435 in general:

City of LA: The basic concept of separating withholding due to delinquent or inadequate payroll records from withholding due to underpayment or other violation (which will now be addressed in Section 16435.5) is a good one. Additionally, the grammatical and wording changes add clarity to the existing language. We have some concern that a portion of the wording may be confusing [addressed in comments on individual subsections below].

Reed: All of the new provisions in this section are extremely valuable to the LCP and set clear guidelines which until know have been cloudy.

Best Best: Section 16435 of the Proposed Regulations provides definitional terms. As we understand the definitions to apply to all provisions of the Proposed Regulations as well as that Section, we respectfully request, as a matter of clarity, that perhaps a new section be added to precede the substantive provisions of the Proposed Regulations that sets forth, solely, those definitions applicable to the Proposed Regulations.

Director's Response: The suggestion to adopt a single set of definitional terms for all of the regulations is a positive one. However, the same thinking led DIR to combine the two prior regulations on withholding authority into a single regulation in 2004, resulting in a great deal of confusion over the distinctions between the two kinds of withholding. Consequently, the Director now proposes to restore some clarity by going back to having two separate regulations on the two kinds of withholding authority, even though this involves some redundant definition standards (as was the case prior to 2004). DIR has not endeavored to collect all definitional standards for this subchapter (on labor compliance programs) within a single regulatory section, but may consider that in the future.

Comment on section 16435 (multiple subsections) after April 4, 2008 revisions:

City of LA: [Repeated two suggestions from its prior comments: (1) that DIR further de-

fine the term "expedited hearing" in subsection (f), and (2) that DIR adopt City's proposed substitute language for subsection (g).]

Director's Response: These proposals are addressed in the responses to the initial comments on these subsections below. No additional response is required.

Comments on section 16435(d):

WCS/Ca: Clarify what is meant by one payroll period in subsection (d)(3). A Contractor should have an opportunity to correct and normally takes 2-3 weeks for revisions and the issuing of restitution to workers.

CalLCP.com: Clear guidance should be given on what constitutes an adequate payroll record.

SCC: At the end of subsection (d)(1), add the following: ", or as allowed for on the DIR's "Public Works Payroll Reporting Form A-1-131"

Director's Responses: The suggestions were not accepted. The basic definitional standards in this subsection have been in place since 1992, and DIR is not aware of any widespread confusion over their meaning. WCS/Ca's comment mixes the two concepts of correcting a payroll record, which is matter of providing accurate and complete information to the labor compliance program, and making restitution to workers, which would come only after the payroll record or other information disclosed that the workers had been underpaid. Regarding SCC's suggestion, Labor Code Section 1776 specifies what must be included in a certified payroll record, while Form A-1-131 is a prescribed format for presenting that information. Consequently, the additional reference would be redundant and possibly confusing or misleading.

Comments on section 16435(e):

Caltrans: Caltrans requests that this subpart include an alternative to accommodate LCPs that use a different method of notification, as long as there is notification of each violation and correction. Caltrans sends a monthly report to prime contractors that, among other things, indicates any subcontractor payroll delinquency or deficiency. When the delinquency or deficiency has been corrected, the notation drops from the report. Caltrans contractors are familiar with this practice, which has been in place for decades and meets the intent of this subpart.

CEA: At the end of this subsection add the following language to clarify a contractor's obligation to comply with other laws besides Labor Code Section 1771.5(b)(5) that may impact the amount of money withheld from the subcontractor:

> "The withholding of subcontractor payments shall not include payments by a contractor to satisfy a third party lien that has caused the subcontractor's failure to pay, a

court order that demands the payment of the subcontractor's money or for the non-payment of wages owed by the subcontractor for work on the public works project.”

City of LA: The OCC strongly applauds the decision to revise subsection (e) to state: "The withholding of contract payments when payroll records are delinquent or inadequate... does not require the prior approval of the Labor Commissioner."

CASH: Amend proposed regulation to read as follows:

["]The Awarding Body shall only withhold those payments due or estimated to be due to the contractor or subcontractor whose payroll records are delinquent or inadequate, plus any additional amount that the Awarding Body or Labor Compliance Program has reasonable cause to believe may be needed to cover a back wage and penalty assessment against the contractor or subcontractor whose payroll records are delinquent or inadequate~~; provided that a contractor shall be required in turn to cease all payments to a subcontractor whose payroll records are delinquent or inadequate until the Awarding Body or Labor Compliance Program provides notice that the subcontractor~~ until the delinquency or deficiency has been cured ~~the delinquency or deficiency~~.["]

LAUSD: Clarify how much is to be withheld. Is it based on the number of delinquent payrolls? What if a contractor submits some but not all required backup items? What if a contractor never submits the documents or a prime contractor refuses to provide information regarding payment on a subcontract?

Director’s Response: The suggestions were not accepted. This proposed subsection does not prescribe a particular form of notification once a deficiency has been cured and consequently does not require modification to accommodate Caltrans’ practice. The additional language suggested by CEA is unnecessary and potentially confusing. The specific directive intended by the concluding proviso is for the prime contractor to stop paying the subcontractor until notified by the program that the delinquency or deficiency has been cured. It is not intended to define or delimit a prime contractor’s other rights or responsibilities, which is beyond the scope of these proposals. CASH’s suggested amendment was not accompanied by an explanation and could be construed as authorizing continued withholding of all contract payments until any wage deficiency disclosed by otherwise complete and accurate payroll records is resolved, which is beyond the authority of this section and Labor Code Section 1771.5(b)(5). The clarifications sought by LAUSD are unnecessary: this section and underlying statute simply require a cessation of payments until the deficiencies are cured, similar to a contractual requirement that would preclude any payment until a proper invoice is submitted. If the subcontractor never submits certified payroll records then contract payments should never be made. The Director further notes that this withholding authority applies to a delinquent or inadequate certified payroll record as defined in subsections (c) and (d) and not to supporting documentation.

Comments on section 16435(f):

Caltrans: It is not possible or necessary for LCPs to provide a hearing in every instance of withholding for delinquent payroll records. First, the prime contractor ordinarily takes immediate steps to correct the problem and there is no need for further action. Second, Caltrans, like other awarding bodies, has a method for contractors to provide notification of disputes and to make claims. If a hearing becomes necessary, it is already provided for contractually, and it is unnecessary to impose a new hearing process on LCPs unless there is no contractual dispute resolution method in place.

ALCP: 1. At the time of a withholding for missing or inadequate records, likely affecting all payments to a given subcontractor, the LCP often cannot determine exactly how much in contract payments are due the subcontractor. A requirement to state the specific amount is more properly applied to a withholding after investigation and determination that a violation has taken place. This provision should be deleted from this section 16435(f). 2. LC Section 1742 does not address expedited hearings related to whether payroll records are missing or inadequate. Section 1742 deals only with hearings following investigation and a Notice of Withholding.

CCMI: CCMI objects to the current wording of this section. In many cases an agency's withholding of progress payments results in nearly immediate submission of certified payrolls, and requiring the LCP to also go through item (3) of notifying the contractor of expedited hearing options can be particularly burdensome and counterproductive. Perhaps the DIR could draft whatever proposed language it feels is appropriate to be included in the notice in section (f), which would provide guidance and consistency to the process.

City of LA: While we can surmise what is meant by "expedited hearing" and support the concept of dealing with violations when payroll records are delinquent or inadequate in an expedient manner, we are not aware of any mention of the concept in the Regulations. We would therefore suggest that expedited hearings be defined, (possibly in Section 16304), along with some discussion of the parameters under which this type of hearing would be appropriate.

Director's Response: The expedited hearing is one that would be provided by a hearing officer or administrative law judge appointed by the Director pursuant to Labor Code Section 1742. That section and the related hearing regulations at 8 CCR sections 17201 – 17270 do not refer specifically to such hearings but provide the necessary general parameters and together with Labor Code Section 1773.5 authorize the Director to afford this due process right to contractors who believe their contract payments have been unlawfully withheld under Labor Code Section 1771.5(b)(5) and this regulatory section. The sole issue in any such hearing will be whether the certified payroll records are delinquent or inadequate. Like the commenters, the Director anticipates that hearing requests will be rare but should be made available for those instances in which the parties dispute whether the records have or have not been submitted or whether submitted records are "inadequate" under subsection (d). As requested by CCMI and as was done previously for Notices of Withholding of Contract Payments issued pursuant to Labor Code Section 1771.7, DIR

will draft a form notice that meets the requirements of this subsection. Finally, the obligation to specify the amount being withheld in the notice is for purposes of informing the contractor or subcontractor of the consequence attached to the failure to submit adequate certified payroll records. The substantive parameters on how much can be withheld are specified in subsection (e), and are tailored so that the program retains the ability to recover any substantive liabilities, particularly in situations where a subcontractor may have abandoned the project and may never submit the required records, without paralyzing the entire project. The requirement in this subsection is just to specify what the program determines should be withheld – principally this will inform a delinquent subcontractor and direct the prime contractor that all payments to the subcontractor must stop. It does not require a precise calculation of what is due to the subcontractor's workers or what is due on the subcontract, although the labor compliance program should have a reasonable ability to obtain or estimate this information through the awarding body's contractual relationship with the prime contractor and the program's awareness of the project.

Comment on section 16435(f) after April 4, 2008 revisions:

ALCP: 1. Labor Code 1771.5(b)(5) requires that progress payments be withheld when payroll records are missing or inadequate. 16435(e) properly clarifies that this withholding should only be against the contractor or subcontractor whose records are missing or inadequate. A stop payment is an appropriate and practical remedy in this urgent situation. Having to estimate the amount of all withholdings at the same time may be inappropriate for a couple reasons: First, it may not be practical to determine how much has been invoiced by and paid to the affected contractor or subcontractor at the time the notice must be given. In large complicated projects, the Prime Contractor would have to do time-consuming research to confirm the total billed by and the total paid to any one contractor or sub-contractor. This could preclude making timely notice, as required by the new regulations. Second, the clear intent of 1771.5(b)(5) is to cease making all progress payments to the affected contractor or subcontractor. This includes any invoices currently in hand, but not paid, as well as any future invoices until the record deficiency is corrected. Because of phasing, extra work orders and a number of other complexities, it is unreasonable to assume an accurate estimation of the value of future invoices. The proposed item (2) would unreasonably complicate a process that is otherwise well described in the revised regulations. 2. Paragraph (3) requires that the LCP's notice must inform the contractor or subcontractor of the right to request an expedited hearing to review the withholding under Labor Code Section 1742. That section does not address expedited hearings and only deals with hearings following investigation and a Notice of Withholding. The regulation should either identify the source of the expedited hearing requirement or delete the paragraph.

Director's Response: After further consideration, the Director decided not to make any revisions for the reasons stated in the response to the initial comments on this subsection immediately above. The requirement in (f)(2) to specify the payments being withheld is to provide notice *of what it is being stopped or held up due to delinquent or inadequate payroll records. While there is an overall substantive limit on this withholding in the preceding subsection (e), this notice requirement does not require a precise calculation of all*

amounts that may remain due to the subcontractor nor of the amount of wages and penalties that might be owed if violations are found. For the reasons stated immediately above, the Director also believes that he has sufficient authority under existing laws and regulations to conduct expedited hearings on appeals from these withholdings, using the Labor Code Section 1742 hearing process. The prevailing wage hearing regulations at 8 CCR sections 17201 – 17270 provide a sufficient beginning-to-end framework for conducting the expedited hearings and affording the parties the necessary due process rights that should attach to a withholding. If more specific procedures are needed, they can be addressed in future updates to the prevailing wage hearing regulations.

Comment on section 16435(g):

City of LA: We are concerned with the wording of this subpart (g), which to less than the most careful reader could imply that penalties that have been withheld due to delinquent or inadequate payroll records should be released to the contractor once the correct payrolls have been produced. We suggest that subpart (g) be amended to state: "The withholding of contract payments solely on the basis of delinquent or inadequate payroll records shall not be permitted after the required records have been produced. Any penalties assessed for such violation pursuant to California Labor Code Section 1776(g) and not resolved prior to project acceptance would therefore be withheld from final retention for the project."

Director's Response: The suggestion was not accepted. As discussed in response to comments on other sections above, the Director does not expect individual regulations to be read in isolation and does not believe the proposed clarification is a necessary or appropriate substitute for understanding the difference between withholding for delinquent records under this section and withholding based on a penalty assessment under proposed section 16435.5. The City's suggested language also is potentially misleading in that it might be read as precluding any penalty assessment for delinquent records until after the project is concluded, although such a limitation does not exist.

Comment on section 16435(g) after April 4, 2008 revisions:

CCMI: CCMI suggests that the language be amended as follows: "No contract payments shall be withheld more than 15 days solely on the basis of delinquent or inadequate payroll records after the required records have been produced." The suggested language change is to allow the LCP sufficient time to review and audit the certified payroll once it has been produced.

Director's Response: The suggestion was not accepted. While the desire for this additional language is understandable, it is not supported by the balance of the regulatory and statutory scheme. The withholding authorized by Labor Code Section 1771.5(b)(5) and this regulatory section is a tool to compel contractors to produce certified payroll payrolls as a condition for continuing to receive contract payments. As such, it is similar to requiring a contractor to submit a proper invoice before a contract payment can be made. However, it is not device to create a lien on wages and penalties that may be owed. When de-

linquent records are produced, the labor compliance program should inspect and review them for adequacy under proposed section 16432(b) [review process] and subsection (d) of this section ["inadequate payroll records"]. However, once the records are reviewed and determined to be adequate, the program has no further authority to withhold contract payments under this section. Any further withholding for the purpose of recovering back wages and penalties must follow the procedures set forth in section 16437 for obtaining the approval of the Labor Commissioner, unless it fits within the limited exceptions of proposed section 16432(f) or the proposed redrafted language of section 16436(b).

Comments on section 16435(h):

Caltrans: The clarification provided by subpart (h) is very helpful because it clarifies when the Labor Commissioner's approval is, and is not, required for withholdings.

ALCP: It has been the clearly expressed policy of DLSE in recent times that the Senior Deputy Commissioner will not deal with or approve the assessment of 1776(g) penalties against subcontractors. Under present policies, this section could only be enforced where a prime contractor fails to provide his own CPRs. In today's world of public works, 90 percent of the payroll activity is by subcontractors. The relevance of this section is minimal.

CCMI: CCMI recommends that the words "within ten days" be added to the end of the first sentence to replace the vague use of the word "timely". Further clarification also needs to be provided that 1776 penalties may be assessed when a subcontractor fails to provide payrolls. Industry practice is such that general/prime contractors do not release all funds to their subcontractors until the end of the project. Thus, any penalty withheld from the final payment on the project should naturally result in the general/prime contractor withholding these same funds from a subcontractor.

LAUSD: For many years, the District's practice was to assess Labor Code §1776 penalties against both prime contractors and subcontractors for failure to submit CPRs and/or backup documents, with the approval of DLSE. The District was informed in 2005 that DLSE no longer approves 1776 penalties for subcontractor violations based on its reading of Labor Code §1776(g). The District has concerns about this interpretation. In the absence of this penalty, there is no "stick" to be used to encourage subcontractor submission of CPRs and/or backup documents. We believe Labor Code §1776(g) is intended to correspond to the good prime contractor provision of 1775(b), and that the withholding procedure should be similar. Therefore, the District requests that DIR clarify the regulation to reflect this procedure. LCPs should be able to request forfeiture and issue Notices of Withholding specifying that the only offending party is the subcontractor, and still serve the Notices of Withholding on the prime contractor (similar to the procedure for 1775(b) withholdings). If DIR does not agree with the foregoing suggestions, the District requests that DIR authorize issuance of a Notice of Withholding against a subcontractor, servable on the prime contractor to the extent the prime has not fully paid its subcontractor. This way, the withholding would pass through to the subcontractor and the prime contractor would not be "assessed" a penalty.

Best Best: It is unclear whether flexibility is afforded to LCPs in the assessment of penalties against good faith errors in supplying payroll records under Section 16435. In our experience the administrative offices of a contractor often are unaware of the timelines for the submission of payroll records and, as a result, Districts will receive the requested certified payrolls a few days or a week late. In such instances, based upon the language in Section 16435(h), a District would be required apply to the Labor Commissioner for a forfeiture of penalties although Section 16435(g) provides that no contract payments may be withheld after the production of delinquent payroll records have been produced.

Director's Response: These comments reflect some of the continuing confusion over the difference between withholding contract payments for delinquent payroll records and withholding on the basis of a wage and penalty assessment. As noted above, the decision to combine the two withholding regulations into a single regulation in 2004 probably contributed to the confusion, and the Director is now trying to fix that error by going back to having two regulations. These comments also reflect an uncertain understanding of the term "penalties." Withholding under this section 16435 for delinquent and inadequate payroll records is not a penalty assessment – it simply means that contract payments to the non-complying contractor or subcontractor must be stopped until the proper records are submitted, at which point payments resume. A penalty assessment for failing to submit payroll records is an after-the-fact determination that the contractor or subcontractor has violated the specific requirements of Labor Code Section 1776(g) and is liable for penalties in the amount specified by that statute. Withholding for such penalty assessments must be handled like other wage and penalty assessments in accordance with the procedures specified in the new section 16435.5 and succeeding sections.

CCMI's suggestion to clarify the meaning of "timely" in this subsection was not accepted since that standard is set, along with other prerequisites for assessing penalties, in Labor Code Section 1776(g). Regarding whether and against whom these penalties can be assessed, the Director first notes that the assessment of Labor Code Section 1776(g) penalties against a prime contractor for a subcontractor's failure to submit certified payroll records is expressly precluded by the language of that statute. Also, provisions that allow penalties for Labor Code Section 1775(a) violations to be set in varying amounts based on "good faith" or other factors and that make prime contractors jointly liable under some circumstances, simply do not exist within nor apply to Labor Code Section 1776. The prime contractor must still be served with a Notice of Withholding of Contract Payments for an assessment of Section 1776(g) penalties, and the "stick" that a labor compliance program has is the ability to require the awarding body to halt contract payments to the non-complying subcontractor or contractor, an action expressly mandated by Labor Code Section 1771.5(b)(5).

DIR acknowledges the recent problem with the Labor Commissioner's office not approving Labor Code Section 1776(g) penalty assessments because requests for approval of forfeiture ostensibly seek authority to withhold those penalties from non-liable prime contractors. Under the statute and regulations, labor compliance programs should have the au-

thority to assess these penalties, and those assessments should be approved, provided it can be done in way that does not make prime contractors liable for subcontractor violations. DIR is working on internal guidelines to make sure that proper Section 1776(g) penalty assessments get approved.

Comments on section 16435.5:

LAUSD: The District believes that Subsection (d) does not impinge on the District's right to withhold contract funds pursuant to the Public Contract Code, Education Code and/or its contract with the prime contractor, and the District intends to continue to do so in the absence of any instruction otherwise.

Best Best: This section provides for the withholding of contract payments but does not reference the good faith mistake provisions of the Proposed Regulations. Also, although there is no timeline set forth in the Proposed Regulations, we trust that the Labor Commissioner will timely identify issues in the exculpatory evidence of a good faith mistake so that a project may be closed out.

Director's Response: This regulation pertains to a labor compliance program's statutory authority to withhold contract payments based on violations of statutory prevailing wage requirements that the program is required to enforce. A labor compliance program must exercise its statutory authority in a manner that is consistent with the prevailing wage statutes and these regulations, irrespective of what the awarding body may or may not be permitted to do under contracting authority conferred by other statutes. "Good faith" mistake provisions are not referred to in this regulation, because this regulation does not address that issue. Those provisions are referred to in other regulations where it is necessary to address that factor. The timeline for the Labor Commissioner to address this factor is also found in another regulation, specifically section 16437, which governs the factors to be considered and time frame within which the Labor Commissioner must determine whether to approve a request for approval of forfeiture.

Comments on section 16436:

Caltrans, City of LA, and LAUSD: Support the revisions to this section.

Caltrans (oral): Not requiring prior Labor Commissioner approval for forfeitures of $1000 or less is extremely helpful because we resolve a lot of our prevailing wage issues at the lowest level possible.

CCMI: CCMI recommends clarification of subsection (b) as to whether the $1,000.00 in "aggregate amount of forfeitures assessed" includes the authority to reduce penalties.

Director's Response: The requirement to include within the brief narrative "the factors considered in determining the assessment of penalties, if any, under Labor Code Section 1775" (subpart (b)(3)) necessarily implies the authority to reduce penalties. Thus, further clarification is unnecessary, and the other comments do not require a response.

Comment on section 16437:

City of LA: Revising this section will have very little impact on the City; however the OCC supports the proposed revisions as a means to ensure that other LCPs are thorough in their investigations. Either Option A or Option B (for subpart (a)(4)) is acceptable. [Three other commenters offered a preference for either the Option A or Option B language for subpart (a)(4), and one other said that either version would be acceptable.]

Director's Response: The Option B language was drafted to go with the Option B version of section 16432 and was selected for that reason.

Comments on section 16437 and Appendix following section 16437 after April 4, 2008 revisions:

ALCP: The suggested format is fine, but this appendix is not referenced or referred to as Appendix E anywhere in regulation Section 16437.

CCMI: CCMI finds that the list of attachments may need to be modified. In some instances there is not a bid advertisement date; then, the LCP needs to know what submission is appropriate for the Labor Commissioner. Secondly, a Notice of Completion is not always filed by the awarding body before these reports are completed. Third, the scope of work description is already included on the front side of the form.

Director's Response: ALCP's suggestion was accepted, and subsection (a) of section 16437 was amended to refer to the Appendix as a suggested format for a Request for Approval of Forfeiture. Regarding the items listed on the Appendix, they should be understood in reference to the information items specified in subsection (a) of section 16437. If a piece of information does not exist, then the program should so state on its Request and provide any relevant substitute information. (For example, if there was no bid advertisement date, the Request should state what date the program selected to fix the applicable prevailing wage rates and the reason or basis for selecting that date. If there is no Notice of Completion, as would be true of any project that is still ongoing, the entry might be "none" or "not applicable" depending on what was stated in the box immediately above.) The Scope of Work in the list of attachments refers to the same items that the program is asked to attach as part of the General Description of Scope of Work under Contractor Information in section 3 of the form. Finally, the Director notes that the boxes on the proposed form were condensed to make the form fit on two pages when sent out for comment as part of the April 4, 2008 revisions. There is no intent to limit programs "to the space provided," and the boxes may be enlarged or additional attachments may be used to ensure that all necessary information is included with the Request.

Comment on section 16438:

LAUSD: The District requests that Subsection (b) be revised to allow the awarding body discretion to choose in which fund its portion of the penalties is deposited. The District

proposes the following language: "... shall be divided between the general fund of the state and the awarding body's appropriate fund..."

Director's Response: Labor Code Section 1771.6(e) states in relevant part that "Penalties shall be deposited into the General Fund of the awarding body . . ." The Director does not have the authority to change this provision by regulation, and consequently the suggestion was not accepted.

Comments on section 16439:

Caltrans, City of LA, and Reed: Support revisions to this section.

Parsons: Clarify whether the "Notice of Withholding of Contractor Payments" Letter would be issued by the Third Party LCP or the District?

SBCTC (oral): Would like clarification in the regulations that a settlement by a labor compliance program is not binding on the Labor Commissioner, or the employee, or other non-party, so that contractors may not use this as a defense against a later claim by an employee who did not receive full restitution.

Director's Response: With regard to Parsons' request, a labor compliance program acts as the agent of the awarding body in all enforcement cases – who has specific responsibility to carry out the specific task to serve a Notice of Withholding of Contract Payments must be determined by those two parties, although a labor compliance program must ensure that appropriate enforcement is conducted, including use and compliance with formal procedures, as part of the program's responsibility to the Director. (See section 16428(a)(3) and the specific requirements of the prevailing wage hearing regulations which are referred to in subsection (a) of this section 16439.) The clarification sought by SBCTC is unnecessary. Such a disclaimer can be found in the prevailing wage hearing regulations, which also apply to enforcement cases initiated by labor compliance programs, at 8 CCR section 17201(c). While that disclaimer refers specifically only to those regulations, it reflects a principle of general application based on how enforcement rights and remedies are allocated among the various persons and entities with an interest in the enforcement of public works employment rights. It is not necessary or appropriate to try to reiterate this principle or detail its nuances in a set of regulations that governs approval and operational standards for labor compliance programs.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative would be more effective in carrying out the purpose for which these regulations are proposed or would be as effective as and less burdensome to affected private persons than these regulations.